—IN THE—

Supreme Court of the United States

EMPIRE STATE CATTLE COMPANY, a Corporation, W. E. WAITE, E. F. WAITE, W. H. FROST, P. H. KELLOGG, C. L. MILLETT and J. D. CARR, *Petitioners,*

vs.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, *Respondent.*

PETITION

FOR THE ISSUE OF THE WRIT OF CERTIORARI HEREIN, TO THE UNITED STATES CIRCUIT COURT OF APPEALS OF THE EIGHTH CIRCUIT.

Petitioners, for the purpose of obtaining a writ of *certiorari* herein, represent as follows, to-wit:

This suit was brought by petitioners as plaintiffs against respondent as defendant, in the Circuit Court of the United States for the District of Kansas, First Division, on November 13, 1903. It is an action at law to recover Fifteen Thousand Dollars damages, for the death of a portion, and injury to the residue, of 798 head of

cattle belonging to plaintiffs, which were shipped over defendant's railway through the State of Kansas. The cattle were purchased by the plaintiffs, in Texas, and were shipped over defendant's road, destined to go to the pastures of plaintiffs in South Dakota.

The petition averred and the proof at the trial showed, that the plaintiff cattle company was a corporation created by the laws of South Dakota and that the other plaintiffs were residents and citizens of South Dakota, and that the defendant railway company was a corporation created by the laws of the State of Kansas, having its chief office at Topeka, in the First Division of the State of Kansas, in which this suit was brought.

The case was tried by the said circuit court, with a jury. The trial continued for a period of nine days, from January 16, 1905, to January 25, 1905, and the trial was had on the petition of plaintiffs, the answer of defendant, and the reply thereto, of the plaintiffs.

The case of the plaintiffs, both in the Circuit Court and in the Circuit Court of Appeals of the Eighth Circuit, was prosecuted by them upon the theory of the liability of the defendant to plaintiffs, on two grounds. First, that the death of and injury to plaintiffs' cattle resulted from the deviation by defendant of the shipment, without plaintiffs' consent, from the line on which the cattle were routed to go; and, second, that the death of and loss to plaintiffs' cattle resulted also from the different negligences of the defendant specified in the petition of plaintiffs.

At the conclusion of the trial, plaintiffs asked the court to give, and presented to the court, fourteen different instructions to the jury. Those instructions may be found from pages 637 to 644 of the Record.

The first instruction (p. 637) was a peremptory instruction which the plaintiffs prayed the court to give,

instructing the jury peremptorily to return a verdict in the case for the plaintiffs. This instruction was founded upon the proposition maintained by plaintiffs that defendant was absolutely liable to plaintiffs on the facts of the case, as a matter of law, for the death and loss of plaintiffs' cattle, by reason of the deviation of the shipment from the routed line without plaintiffs' consent; and the prayer in this peremptory instruction proceeded upon the theory that that branch of the case, on the undeniable and conceded facts of the case, presented a question of law for decision by the court.

The other thirteen instructions presented at the same time with said peremptory instruction and to be found from page 638 to 644 of the Record, were instructions asking the court, in the event that the peremptory instruction should be denied, to submit to the jury the issues of negligence in the case. All of the thirteen instructions referred to, asked the court to submit the issues of negligence to the jury. It was, of course, understood by the court, as well as by counsel, that, if the peremptory instruction based on the unlawful and wrongful deviation, was given, it would not be necessary to consider those other instructions.

At the same time plaintiffs presented those several instructions, defendant asked a peremptory instruction to the jury. The court gave the defendant's peremptory instruction to the jury, to return a verdict for the defendant, and denied each and all of plaintiffs' said instructions. To those several rulings, plaintiffs excepted at the time.

The jury, under the instructions of the court, gave a verdict for the defendant (p. 644, Record) and a final judgment was given for the defendant (pp. 26-27, Record).

Afterwards plaintiffs filed a Bill of Exceptions in the case, which extends from p. 29 to p. 656 of the printed Record.

The pleadings in the case may be found from p. 3 to p. 21 of the Record.

A history of the trial of the case will be found from p. 21 to p. 28 of the Record.

The final judgment in the case, in the Circuit Court, was given January 25, 1905.

Within due time the cause was duly removed by a writ of error, citation and by filing an assignment of errors to the United States Circuit Court of Appeals of the Eighth Circuit.

The case was heard in the Circuit Court of Appeals in December, 1905, and was decided by that court July 9, 1906, by an affirmance of the verdict and judgment of the Circuit Court. (*Empire State Cattle Co.* v. *A., T. & S. F. Ry. Co.*, 147 Fed. Rep., 457.)

Afterwards, on August 9, 1906, said Circuit Court of Appeals made an order extending the time to November 1, 1906, within which plaintiffs could file their petition for a rehearing in said cause.

Afterwards, on September 20, 1906, plaintiffs filed their petition for a rehearing in said cause, after serving the same on counsel of defendant, and said petition for a rehearing having been served and filed, in accordance with the rules of said United States Circuit Court of Appeals, was considered by that court and denied, November 17, 1906; and, by the denial of said petition for a rehearing, said judgment of affirmance of said Court of Appeals of the said judgment of the said Circuit Court in said cause became final.

Said petitioners further show to the court, as will appear from the opinion of said Circuit Court of Appeals, (147 Fed., 457), that said judgment of affirmance by said Court of Appeals was based upon the ground adjudged in its opinion by said Circuit Court of Appeals, that, because plaintiffs, at the conclusion of the trial of

said cause in said Circuit Court, presented to and requested said Circuit Court to give a peremptory instruction to the jury to return a verdict for plaintiffs, plaintiffs were precluded from the right to have considered said other thirteen instructions, although presented at the same time of and with said peremptory instruction in the event that said Circuit Court should deny said peremptory instruction asked by plaintiffs.

Petitioners say they are advised that said ruling of the Circuit Court of Appeals in its opinion affirming the judgment in this cause, is the first and only time that it has been adjudged by any American court, state or federal, that a party to a suit, who asks the giving of a peremptory instruction to a jury and at the same time asks the giving of other instructions to the jury submitting the issues to the jury in the event that the peremptory instruction thus asked shall be denied, is precluded, by the asking of such peremptory instruction under those circumstances, from having the other instructions considered, if the peremptory instruction is denied. Petitioners say they are advised that it is the general practice as understood by the members of the American bar, generally that where, as in this case, instructions are asked, one of which is a peremptory instruction to the jury and the others submitting the issues to the jury, for the court, in the event of the denial of the peremptory instruction, to consider the other instructions for the submission of the issues to the jury; and petitioners in that view, submit that the decision in this cause by said Circuit Court of Appeals is contrary to the general practice which prevails in the federal and state courts in like cases.

Petitioners show to the court, as appears from the opinion of said Circuit Court of Appeals, that said opinion is contrary to a decision of this court and to the decisions in like cases of other Circuit Courts of Appeal

and is also contrary to the decisions of the Court of Appeals of the State of New York, cited in said opinion in this case.

Said petitioners, in order to enable this court to see how the issues of deviation and negligence in this case arose, submit in this, their petition for a writ of *certiorari,* the following statement of facts:

On May 25, 1903, petitioners were the owners of the 798 head of cattle in controversy at Hereford, Texas, which they shipped from said Hereford for transportation, by rail, from that point to Evarts, South Dakota; that said shipment was made from said Hereford, Texas, over three lines of railway, to-wit, from said Hereford to Amarillo, Texas, over the Pecos & North Texas Railway; from Amarillo to Atchison, Kansas, over defendant company's railway, and from Atchison, Kansas, to Evarts, South Dakota, over such connecting line of railway as should receive said cattle from said defendant railway company at said Atchison, Kansas.

Said 798 head of cattle, in the cars in which they were shipped, were delivered to defendant at said Amarillo, Texas, for shipment over defendant's railway north to Atchison, Kansas, to be there delivered by it to said connecting railway company, and said defendant, on May 25, 1903, accepted from plaintiffs said 798 head of cattle for shipment from said Amarillo, Texas, to said Atchison, Kansas.

Said 798 head of cattle were transported by defendant, as such common carrier, from Amarillo, Texas, to Strong City, Kansas, which is a station on said defendant's line of railway between said Amarillo, Texas, and Atchison, Kansas.

In said State of Kansas where said defendant's railway crosses said state, in passing from Amarillo, Texas, to Atchison, Kansas, there are three cities situate on said

railway, viz: Strong City, Kansas, Emporia, Kansas, and Topeka, Kansas. The general course of defendant's railway across said State of Kansas, in passing from Amarillo, Texas, to Atchison, Kansas, is from southwest to northeast. Strong City, Kansas, is southwest, or southwesterly, from Topeka, and Emporia, Kansas, is between Strong City, Kansas, and Topeka, Kansas.

Said cattle of petitioners were unloaded by defendant into defendant's pens, at said Strong City, Kansas, on May 26, 1903, for the purpose of being fed and watered and of obtaining rest, as provided by the law of Congress in such cases. Petitioners' cattle were so unloaded on the night of May 26, 1903, and were ready to be reloaded and for the transportation to be continued and the transit resumed on the next morning of May 27, 1903.

During the entire month of May, 1903, there were continuous rains night and day, in the valley of the Kaw river, which flows from Eastern Colorado to Eastern Kansas, east, across the State of Kansas, and which empties into the Missouri river, at Kansas City, Missouri. The watershed of the Kaw river extends from the southern portion of Nebraska across the northern part of Kansas, to a point about ten miles south of said Kaw river.

Said rains created in the valley of said Kaw river an unprecedented flood, which commenced to rise about May 15, 1903.

Notwithstanding said 798 head of cattle had been fed and watered and had time to rest so that they were ready to be reloaded and were ready for the transportation and carriage thereof to be resumed and continued on the morning of May 27, 1903, defendant railway company, by reason of the rise of said flood, detained said cattle on its, the defendant's own motion, at said Strong City, in the pens of defendant, from the said morning of

May 27, 1903, until noon, May 29, 1903. Said May 27, 1903, was on Wednesday, and said flood, as we will see further on, reached its climax Saturday night, May 30, 1903. After so detaining said cattle at Strong City from Wednesday morning to Friday noon, May 29, 1903, and after loading, unloading and reloading said cattle two or three times at Strong City by defendant railway company, defendant continued the transportation and transit of said cattle Friday noon, May 29th, 1903, and said cattle were by defendant then hauled from Strong City, Kansas, to Emporia, Kansas, which last city is southwest of Topeka, Kansas, and is on the uplands some considerable distance from the valley of the Kaw river at Topeka.

As already stated, said 798 head of cattle were routed to go over defendant's railway northeasterly, passing through said Strong City, Kansas, Emporia, Kansas, and across the Kaw river at Topeka, and thence northeasterly to Atchison, Kansas, which is situate on the Missouri river. (Opinion of trial court, Record, p. 645, 135 Fed. Rep., 135.)

On the arrival of the cattle at Emporia during the afternoon of Friday, May 29, 1903, it was and had been for six hours and more known by the defendant's officers and servants, that the line on which these cattle were routed to go to Atchison, crossing over the Kaw river at Topeka, was flooded and had been flooded from two o'clock that morning, so as to be impassable; that defendant's line from Topeka to Kansas City had been likewise flooded so as to be impassable and the transit and transportation of said cattle at said Emporia was by defendant, its officers, agents and servants, without plaintiff's consent, deviated from their route and transit over defendant's line northeast to Topeka and Atchison, to another line of defendant, known as the "Ottawa cut-off"

and which cut-off extended from Emporia to Kansas City, by way of Ottawa, Olathe and Holliday, and from Holliday over its line from Topeka to Kansas City, Missouri.

In this connection, it should be stated that the defendant had and has no railway running from Kansas City to Atchison, Kansas. The only railway owned or operated by defendant, either in 1903 or since, north or east from Kansas City, is its line from Kansas City to Chicago.

The transit and transportation of said cattle which were thus deviated at Emporia, Kansas, were so deviated for the purpose of transporting the same over said cut-off of defendant, to Kansas City, Missouri, which was sixty miles and more east of Topeka, Kansas, and distant that far from the line of defendant's railway on which, by the shipping contract of the parties, said cattle were routed to go in their passage to South Dakota.

After the deviation of said cattle at said Emporia, Kansas, over said other line, defendant ascertained that it could not get to Kansas City over its own line; and, on the arrival of the train containing the cars which carried petitioners' cattle, at Olathe, Kansas, during the night of Friday, May 29, 1903, defendant, finding that it could not get to Kansas City over its own line in consequence of the fact that all of its lines west of Kansas City, including said cut-off, were flooded, transported said train of cars containing petitioners' said cattle in a roundabout way to said Kansas City from said Olathe, over the tracks of the St. Louis & San Francisco Railway Company. In this way defendant succeeded in transporting said train of cars conveying petitioners' said cattle from the uplands over which said cattle had been transported up to that time, to the valley and mouth of the Kaw river at Kansas City, where said defendant, without obtaining pe-

titioners' consent, unloaded said cattle in the shipping pens at the Kansas City Stock Yards, alongside of and at the mouth of said Kaw river. Said cattle were unloaded in said stock yards on the morning of Saturday, May 30, 1903. On Sunday, May 31, 1903, the said flood which had so continued during a large part of said month of May, 1903, in the valley of said Kaw river, rose to such heights as to flood said stock yards, and said cattle, having been left without any further attention by defendant railway company after the deposit by it of said cattle in said stock yards, were, by the agents and employees of said stock yards company, driven out of the pens in said stock yards, on said Sunday, up into the overhanging viaducts and chutes which passed through and over said stock yards. This was done by the officers and employees of the Stock Yards Company, for the purpose of preventing said cattle from being drowned in said stock yards. Said cattle remained in said overhanging chutes and said viaducts several days, during which time, in consequence of the impossibility of feeding and watering said cattle, a large number of them died and the balance were very seriously damaged.

The petition of the plaintiffs in the case, after fully stating the foregoing facts, and other facts, summed up therein the grounds of liability claimed against the defendant, as follows:

"1. Defendant did not exercise due and reasonable care, but was negligent in the detention of said cattle at Strong City, Kansas, from May 27th, 1903, to May 29th, 1903, and in not carrying and transporting on May 27th, 1903, said cattle from said Strong City, Kansas, to Atchison, Kansas, by way of Topeka, Kansas, so that said cattle might have been by defendant, at said Atchison, Kansas, delivered to a continuing and connecting carrier at that point.

2. Defendant did not exercise due and reasonable care in the transportation and carriage of said cattle, but

was negligent in not detaining said cattle at Strong City, Kansas, on said May 29th, 1903, until the said unprecedented flood in said Kaw river had subsided, so that the transit of said cattle might be safely resumed without liability to damage or injury thereto.

3. Said defendant did not exercise due and reasonable care, but was negligent and acted wrongfully and without plaintiffs' consent in the deviation of the shipment by said defendant to Kansas City, from which last point and city, defendant had and has no connecting line extending to Atchison, Kansas.

4. Defendant did not exercise due and reasonable care in the transportation and carriage of said cattle by carelessly and negligently endeavoring to head off the flood of said Kaw river by landing and depositing said cattle in the pens on the bank of said Kaw river, at the mouth thereof several days after the rise and increase of the flood of said Kaw river, and plaintiffs say that defendant by its agents and servants in charge of the transportation of said cattle of plaintiffs had actual knowledge of said flood from said May 27th, 1903, and well knew of said flood, and of the continued rise and increase thereof on said May 30, 1903, when said defendant so deposited said cattle of plaintiffs in said pens by the side of said Kaw river at the mouth thereof.

5. That defendant having wrongfully transported said cattle to Kansas City as aforesaid, carelessly and negligently failed and neglected to move or cause to be moved the same from their position of peril aforesaid at Kansas City, Missouri, as it had reasonable time and opportunity to do, before the arrival at said Kansas City of said flood, but the same were overtaken by said flood."

At the trial of the case in the Circuit Court, Mr. Connor, who has charge of the United States Weather Bureau office at Kansas City, Missouri, testified that the rainfall which produced the Kaw river flood of May, 1903, commenced in April, 1903; that there was a slight cessation of the rain early in May and another cessation from about the 15th to the 18th of May, 1903, and with

that exception the rains were continuous through May, night and day. (p. 300, Record.)

The defendant, during 1903 and ever since, has had its chief offices at Topeka, Kansas, which is about sixty miles west of Kansas City, and Mr. Connor testified that a flood in the Kaw river at Topeka would, in the regular course of the flow of water, reach Kansas City in about thirty hours.

Mr. T. B. Jennings, who had charge of the United States Weather Bureau at Topeka, Kansas, testified that the rainfall the first twenty days of May, 1903, averaged about four inches, in the western part of the Kaw water shed; that from the 21st to the 28th of May, 1903, the rainfall in that region averaged another four inches, and that on May 28, 1903, came the tremendous rainfall in that region, which was about five and one-fourth inches, at Salina, Kansas. He said, "We got a month's rainfall during the first twenty days of May, we got an average May rainfall, then during the next 7 days that was re-May rainfall, then during the next seven days that was repeated, and on the 28th we had the tremendous downpour in the central counties, extending from Saline county northeastward into Marshall." (p. 129, Record.)

Another witness in the case (p. 223, Record) was W. E. King, Assistant City Engineer of Topeka, Kansas, who testified that he took observations of the rise of the Kaw river at Topeka, and that on the morning of May 28, 1903, at 8:30 o'clock, the Kaw river was then 16.88 feet, or eleven inches, above low water mark; that the Kaw river continued to rise after that; that he kept men stationed at that point until the crest of the flood; that he had a thirty minutes continuous report from May 28, at 8:30, to June 6, at 10:30; that the crest of the flood was reached at 9 p. m. on May 30, and that between 8:30 the morning of the 28th, and 9 p. m. of May 30, the water rose ten and one-tenth feet.

The testimony of Theron S. Cafferty (p. 225, Record), and of C. T. McLellan (p. 292, Record), who were division officers of defendant company, shows that defendant's roads in Kansas, from Topeka to Atchison, from Topeka to Kansas City and from Holliday to Kansas City, were all flooded from an early hour on the morning of Friday, May 29, 1903, and that all those lines of defendant, over one of which this train of cars would have to go in going to Kansas City, or northwardly, were flooded, as already stated, from an early hour on the morning of Friday, May 29, 1903, and that those facts were well known, not only by those division officers of defendant company, but by Superintendent Hurley and all the general officers of the defendant company; that so extraordinary and perilous were the flood conditions on all of defendant's lines in the State of Kansas on said Friday morning, May 29, 1903, that attention was given to those conditions by Superintendent Hurley and the other general officers of the defendant, and that the movements of the train in question carrying petitioners' said cattle, were directed personally by Superintendent Hurley and the other general officers of the company, and the facts show that for six hours before said Friday noon, May 29, 1903, when said transit was resumed from said Strong City, said lines were and had been so flooded as to make it impossible for the defendant to reach the valley of the Kaw river or to cross the same, or to reach said Kansas City over any of the said lines of defendant. The evidence at the trial, which fully sustains all the averments of the petition and shows the foregoing facts, proves that the defendant company in starting said shipment from Strong City and in deviating the same from said Emporia, knowingly and wilfully went into the mouth of the flood, at its climax.

In support of the first specification above named, that defendant was negligent in detaining petitioners'

said cattle at said Strong City from Wednesday morning May 27, 1903, to Friday noon, May 29, 1903, reliance at the trial was placed on the testimony of the witnesses W. H. Frost (p. 37, Record), G. W. Cloyd (p. 31, Record), and J. D. Carr (p. 116, Record). By the testimony of those gentlemen it was shown that at the same time of the purchase and shipment of those 798 cattle out of Texas, another train load of cattle was bought by plaintiffs and shipped, in like manner. The shipping contracts and the billing and routing of that other train load of cattle, which contained 763 head of cattle of the same class and character of cattle as the 798 head of cattle in controversy, were in all respects the same as the shipping contracts and the billing of the 798 head of cattle in controversy. The only difference between the other train load, which was in charge of Cloyd, was that it was about four or five hours ahead of the train load containing the cattle in controversy. Said other train load of 763 head of cattle was likewise stopped at Strong City, for feed and water and rest, but the transit and transportation of said other train load of cattle was resumed and continued by defendant, Wednesday evening, May 27, 1903, from said Strong City, and said other train load of cattle was hauled by defendant over its said line through Emporia and Topeka, to Atchison, Kansas, and there delivered by defendant to the connecting carrier, and by the connecting carrier continued north, so that said other train load reached its destination in South Dakota on Monday, June 1, 1903.

The evidence shows that both those train loads of plaintiffs' were in the stock yards at Strong City, from Tuesday night until Wednesday evening, when, as already stated, said other train load was hauled out and its transit and transportation continued by defendant to its destination. The history of said other train load of

cars, as given above, shows that defendant was negligent in not continuing from said Strong City, on said Wednesday, May 27, 1903, the transit and transportation of the train load of cattle in controversy.

Defendant was likewise negligent respecting the second of the above specifications, in leaving said Strong City on said Friday noon. As already stated, all of defendant's lines in Kansas were flooded early that Friday morning, and the testimony of Assistant Engineer King, of Topeka, shows that on Friday there was a tidal wave of water passing down the Kaw, which had accumulated from the rains described by said Jennings and had reached at that time the City of Topeka and which, according to the testimony of Weather Bureau Superintendent Connor, was certain to reach Kansas City within thirty hours after its passage by Topeka on said Friday. It was therefore reckless, if not madness, for defendant, having detained petitioners' cattle at said Strong City over two days, to attempt to reach or get across the Kaw River after awaiting the arrival of the very climax of the flood, especially by such attempt at the mouth of that river.

The third specification, that defendant was negligent in endeavoring to get across the Kaw river by taking the cattle over its cut-off from Emporia, was sustained by the evidence.

The fourth specification of negligence was also sustained by the evidence.

The fifth specification of negligence, that defendant carelessly and negligently failed and neglected to move, or cause to be moved, said cattle from their position of peril in said stock yards, was sustained by the evidence.

One of the witnesses in the case was William M. Kendrick (Record, p. 283), who was the live stock agent at Kansas City of the C., B. & Q. R. R. Co., and who

testified that his company could have taken petitioners' cattle out of Kansas City, north across the Kaw River, on the afternoon of Saturday, May 30, 1903; that he offered to defendant to take and transport the cattle in controversy, but that the defendant company refused and neglected to deliver the cattle to the said "Burlington" Company for that purpose; that as evidence of the fact that said Burlington Company could have taken petitioners' cattle out of and across said Kaw River, northerly, out of Kansas City on said Saturday afternoon. Mr. Kendrick testified that on said Saturday evening, May 30, 1903, 35 cars of cattle were shipped out of Kansas City north across said Kaw River by said Burlington Railroad Company (Record, pp. 227-228).

Another witness in the case was W. C. Sparks (Record, p. 345), who testified that he was a member of the firm of Sparks Brothers, who were engaged in the mule business at Kansas City and had a mule yard a block south of the Kansas City Stock Yards, where petitioners' cattle were penned, and that on Sunday morning, May 31, 1903, Mr. Sparks' company drove out of their said mule yards, between six hundred and seven hundred head of mules, up out of the Kaw valley south, up to and on the uplands immediately south of Kansas City, and that in this way their mules were saved from the flood; and the testimony of Mr. Sparks shows that the same could have been done on that Sunday morning by defendant company, with respect to petitioners' said cattle in said stock yards, and that that was the wise and prudent course to have taken concerning petitioners' cattle instead of driving them up into said overhanging viaducts and chutes where petitioners' cattle were certain to and did suffer and die from starvation and want of water.

Another witness in the case was L. A. Allen (Record, p. 226), who testified that there were plenty of men

and instrumentalities in and around the stock yards in Kansas City on that Sunday morning, by whom the cattle of petitioners could have been driven out of said stock yards.

The testimony in the case shows that said cattle of petitioners in the stock yards and the cattle of the plaintiff, Minnesota & Dakota Cattle Company, in the other companion case, presented also to this court for the writ of *certiorari*, constituted about all the cattle that were in the stock yards at said Kansas City on said Sunday, May 31, 1903.

Another witness in the case was one G. A. Roberts (Record, pp. 522-523), who was the live stock agent of the defendant company at Kansas City, whose testimony shows that defendant and its agents and officers gave no attention to the cattle of the petitioners after they were thus deposited Saturday morning, May 30, 1903, in said stock yards, by the defendant railway company.

Another witness in the case was one A. W. Coombs (Record, p. 580), who was the Assistant General Live Stock Agent of defendant company at Kansas City, and who testified also that the officers of defendant company gave no attention to these cattle after they were deposited Saturday morning in said stock yards.

Another witness in the case was one Sharp, who was the superintendent of defendant's terminals at Kansas City, and whose testimony shows that he and General Superintendent Hurley were engaged Saturday and Saturday afternoon in moving from the defendant's yards at Argentine a large number of cars and engines out of danger from the rising flood, but that neither of those officers, nor any of the other officers of defendant, paid any attention to petitioners' cattle which had been by defendant thus deposited in said stock yards.

Petitioners submit that the opinion of the Circuit Court of Appeals in this case is opposed to the decisions of the New York Court of Appeals, cited in said opinion of said U. S. Court of Appeals. Thus, in *Kurtz* v. *Peck*, 113 N. Y., 222, it was adjudged that:

"Where, upon a jury trial, each party asks that a verdict be directed in his favor and neither asks to go to the jury on the questions of fact, the court is authorized to find upon the facts."

The above language clearly indicates that the court, in that case, held that if a party asks for a peremptory instruction and at the same time asks, in the event of the denial of that instruction, to go to the jury upon questions of fact, the party is not precluded by his peremptory instruction.

The same ruling was made by the same court, in *Sutter* v. *Vanderveer*, 122 N. Y., 652.

In the case of *Koehler* v. *Adler*, 78 N. Y., 287, the New York Court of Appeals, in an opinion delivered by Chief Justice Church and concurred in by the full bench of that court, used the following language:

"The action was for money loaned, and the verdict was directed by the court. The defendant alleges error in not submitting the case to the jury. At the close of the evidence the plaintiff asked the court to direct a verdict in his favor, and the defendant then requested a like direction in his favor. The court stated that he thought the plaintiff entitled to the direction. The counsel for defendant then asked to go to the jury upon the question whether the debt in suit was ever contracted at all. This was denied, and an exception taken. Upon these facts we think that the defendant was entitled to go to the jury if the case warranted it. If nothing further had been done after both parties asked a direction of a verdict, it would be assumed that they intended to waive the right of submission to the jury, and consented that the court should decide the questions of law and fact in-

volved. But after a request, and a refusal to direct a verdict, there is no absolute inconsistency in asking to submit questions of fact to the jury. It is not proper, ordinarily, to direct a verdict if there is any material question of fact which ought to be submitted, and it is error to make the direction in such a case. Parties may consent, however, that the court may pass upon all questions both of fact and law, and if they do they will be bound, and when both parties ask a direction this court will presume such consent. In this case the presumption is repelled by an express request to go to the jury upon a question of fact."

Said opinions of the New York Court of Appeals are in harmony with the understanding of the profession and the practice which everywhere prevails, both in the state and federal courts, by which practice a party may submit a series of instructions to the court, one of which is peremptory in its character and the others of which are asked by the party submitting the instructions, in the event that the peremptory instruction is denied.

Petitioners are advised that great surprise will be experienced on the part of the bar, if this rule contended for by them in this case is permitted to be overturned by an affirmance of the decision of the Court of Appeals in this case. The opinion of the Court of Appeals in this case is also opposed to the express decision of the Circuit Court of Appeals of the Second Circuit, in the case of *Sigua Iron Co.* v. *Greene,* 88 Fed., 207; 31 C. C. A., 477. The decision of the Circuit Court of Appeals in that case, as will be seen from the opening paragraphs of Circuit Judge Lacombe's opinion, is squarely in favor of the proposition we contend for and is decisive against the decision of the Court of Appeals in this case. Between the Circuit Court of Appeals in the Second Circuit, in that case, and the Circuit Court of Appeals in this case, there is a direct and irreconcilable conflict.

In the case of *Merwin* v. *Magone,* 70 Fed., 776; 17 C. C. A., 361, the court in its opinion by Judge Shipman, said:

"It will be observed that neither party raised a question of fact, and each asked for a direction in his favor. In such a case, the finding is conclusive if there is any evidence to sustain it."

To the same effect is *Magone* v. *Origet,* 70 Fed., 778; 17 C. C. A., 363.

So, in the decision of the Circuit Court of Appeals of the Second Circuit, in the case of *Chrystie* v. *Foster,* 61 Fed., 551; 9 C. C. A., 606, that court, in its opinion by Judge Wallace, said:

"Where the defendant excepts to the direction of a verdict for the plaintiff, but makes no request to go to the jury, he cannot be heard to assail the judgment upon the ground that there were questions of fact for the jury. *Provost* v. *McEncroe,* 102 N. Y., 650, 5 N. E., 795. Where both parties move for the direction of a verdict, and neither requests any question of fact to be submitted to the jury, they concede that there is no question of fact, and that the case turns wholly upon the questions of law, which are to be determined as though the facts were undisputed."

The opinion of the court is also opposed to the opinion and decision of the Circuit Court of Appeals of the Sixth Circuit, in the case of *Monahan* v. *Grand Trunk Western Ry. Co.,* 138 Fed., 37.

In the opinion in that case, which was delivered by Circuit Judge Severens, the court said:

"The second question propounded by counsel is based upon the following facts: At the close of the production of evidence the counsel for the defendant preferred a request to the court that the jury be directed to return a verdict for that party. This request having been discussed by the counsel for the respective parties, the

court was proceeding to give its opinion and instructions to the jury, and seemed to indicate, as plaintiff's counsel thought, a purpose to sustain the defendant's request for a positive direction in its favor. Thereupon the court permitted an interruption to allow the plaintiff's counsel to put on file certain requests to instruct the jury, and assured the counsel that he should have the benefit of them, and then, after giving its views at length, directed a verdict for defendant. The requests filed by plaintiff were eighteen in number, the first being as follows:

'(1) Under the pleadings and proofs, you are instructed that your verdict must be for the plaintiff, and the only question for you is as to the amount of damages.'

"The others related to particular matters of law and fact involved in the issue. The court did not comply with any of these requests. The plaintiff excepted to the ruling of the court upon defendant's motion for directing the verdict in its favor, and to the refusal of the court to give the instructions requested in his behalf. Counsel for defendant now urge that the request of each of the parties for a peremptory instruction by the court had the effect of a joint withdrawal of the issues of fact from the jury and a submission of them to the court for its determination, and that, the court having decided them in favor of the defendant, both parties are concluded by the finding, citing *Beuttell* v. *Magone*, 157 U. S., 154, 15 Sup. Ct., 566, 39 L. Ed., 654. In that case there was no disputed question of fact, and it only remained for the court to state to the jury what the facts were, and what the law applicable to those facts was. And what the court there held in effect was that the court might state the facts as agreed, and not submit them to the jury. The language of Mr. Justice White, taken apart from the case before the court, might justify the conclusion which the counsel draws from it. But it would seem that the decision cannot be regarded as furnishing a rule for cases where the evidence is conflicting, and where the party whose request is refused has coupled with his request other requests directed to particular aspects of the case, which repel the implication

that the party had consented to a submission of the facts to the court. And in all the cases in which the case of *Beuttell* v. *Magone* has been cited in the appellate courts the conditions were the same; there was no disputed question of fact, and there were no special requests. *Merwin* v. *Magone*, 70 Fed., 776, 17 C. C. A., 361; *Magone* v. *Origet*, 70 Fed., 778, 17 C. C. A., 363; *Bradley Timber Co.* v. *White*, 121 Fed., 779, 58 C. C. A., 55; *United States* v. *Bishop*, 125 Fed., 181, 60 C. C. A., 123; *Phoenix Ins. Co.* v. *Kerr*, 129 Fed., 723, 64 C. C. A., 251, 66 L. R. A., 569.

"In *Beuttell* v. *Magone* it is expressly stated that such request made by the respective parties is not the equivalent of a submission of the case to the court without the intervention of a jury, within the intendment of Rev. St., sections 649, 700 (U. S. Comp. St. 1901, pp. 525, 570). The rule must therefore rest upon an implication of consent. Can any implication of consent be fairly drawn when, as here, the party couples his request for a peremptory instruction in his favor with further requests for instructions on the questions of law applicable to certain assumed facts which the jury may find? The presentation of requests for instructions in that form necessarily imports that the party expects that, if his first request is refused, the case will go to the jury, and that the court will give his other requests, or such of them as the court thinks are proper. For, if his request for a peremptory instruction is given, the others are futile. May not a party ask for a peremptory instruction in his favor, without depriving himself, if the court thinks he is not entitled to it, of the right to have the jury pass upon the evidence and determine the issue? No valid reason is perceived why he should pay the penalty of losing a constitutional right by invoking the opinion of the court *pro hac vice* upon the preliminary question. It is, we believe, a common practice of the state and federal courts in Michigan and elsewhere in this circuit, when the party wishes to obtain the opinion of the court upon the question whether there is any evidence which could fairly be relied upon to defeat his claimed right, and, if the opinion of the court should be that a question for the jury is presented, then to ask that appropriate in-

structions be given them to guide their deliberations, to present all his requests in a body, and the courts understand that to be the purpose, and conform to it. This was the course pursued here, and we do not think we should be justified in extending the rule stated in *Beuttell* v. *Magone* to a case thus differently circumstanced. In the case before us it is apparent that the judge did not suppose he was intrusted with the ultimate finding of facts in the case. It appears that, before the plaintiff's requests were filed, the court had already indicated to the plaintiff's counsel that it was about to give a direction in favor of the defendant, and had already determined that the plaintiff was not entitled to recover. The court also stated that it would give to the plaintiff the benefit of his requests. But these could be of no benefit if the case was to be concluded by the judge's opinion on the facts. All this indicates that the court was co-operating with the plaintiff's counsel in his effort to save the questions presented by his requests."

So far as we have been able to observe, it is true of all of the cases, state and federal, in which this question of waiver where both parties have joined in asking a peremptory instruction alone, arose that each case presented a single issue on the part of the plaintiff, and that an issue of fact triable by the jury; and, as we have seen, save and except the decision of the Court of Appeals in this case, in each of that class of cases involving a single issue alone, the rulings have been that where either party at the time of presenting a request for a peremptory instruction also presented a series of instructions to be given to the jury in the event of the denial of the peremptory instruction, the party thereby did not waive the right to go to the jury on the issues of fact.

But in the case at bar, there were and are two issues tendered by the plaintiffs. In the case at bar, from the beginning of the case as made by the petition, the plaintiff claimed a liability on the part of the defendant rail-

way carrier upon two grounds, one on the ground of deviation, without plaintiff's consent, of the shipment from its line running to Topeka and Atchison, to Kansas City, from which point it had no line to Atchison, the other the grounds of negligence aforesaid.

We contended in the Court of Appeals, that the authorities are practically unbroken to the effect that where a shipment is deviated by the carrier, as in the case at bar, without the consent of the shipper, the carrier assumes by such deviation absolute responsibility, and the act of God is no defense in that class of cases.

In our brief in the Court of Appeals in this case, in support of the proposition of absolute liability of the defendant carrier, on the ground of deviation, we cited the following authorities:

Crosby v. *Fitch*, 12 Conn., 410, l. c. 419, 420. 423;
R. R. Co. v. *Beck*, 125 Pa. St., 620;
Phillips v. *Bingham*, 26 Ga., 617;
R. R. Co. v. *Cole*, 68 Ga., 623;
Cassilay v. *Young*, 4 B. Mon., 265;
Sager v. *R. R. Co.*, 31 Me., 228, l. c. 238;
R. R. Co. v. *Washburn*, 22 O. St., 324;
Ex. Co. v. *Smith*, 33 O. St., 511;
Brown Co. v. *R. R. Co.*, 63 Minn., 546;
Hedricks v. *Steamship Co.*, 18 La. Ann., 353;
Hastings v. *Pepper*, 11 Pick., 41;
Proctor v. *R. R. Co.*, 105 Mass., 512;
Ry. Co. v. *Allison*, 59 Tex., 193;
Johnson v. *Ry. Co.*, 33 N. Y., 610, l. c. 611;
Goodrich v. *Thompson*, 44 N. Y., 324;
Maghee v. *R. R. Co.*, 45 N. Y., 514;
Keeney v. *Ry. Co.*, 47 N. Y., 525;
Robertson v. *Nat. S. S. Co.*, 14 N. Y. Sup., 313;

Seavey Co. v. *Union Trans. Co.*, 106 Wis., 394;
Ry. Co. v. *Brichetto*, 72 Miss., 891;
R. R. Co. v. *Odil*, 96 Tenn., 61;
Mer. Dis. Tr. Co. v. *Kahn*, 76 Ill., 520;
Vol. 1. Am. & Eng. Enc. Law (2nd Ed.), 594;
Vol. 5 Am. & Eng. Enc. Law (2nd Ed.), 422, 426;
Hutchinson on Carriers, Secs. 190, 191;
Lawson on Bailments, Sec. 127;
Vol. 6 Cyc. of Law & Procedure, 383, 384;
Marsh v. *Un. Pac. R. R. Co.*, 9 Fed. Rep., 873;
Ins. Co. v. *LeRoy*, 7 Cranch., 26;
Hostetter v. *Park*, 137 U. S., 30, l. c. 40;
Constable v. *Steamship Co.*, 154 U. S., 51, l. c. 66.

In the Court of Appeals, in our brief in this case, we contended in support of the proposition that in cases like this where the act of God is claimed to be the cause of the result, the carrier is still liable if it is guilty of contributory negligence, operating in connection with the act of God to cause the injury, and in support of that proposition in our brief in the Court of Appeals, we cited the following authorities:

Sweezy v. *Philadelphia*, 64 Pa. St., 106;
Helbling v. *Cemetery Co.*, 201 Pa. St., 171;
Morrison v. *Davis*, 20 Pa. St., l. c. 176, 177;
Williams v. *Grant*, 1 Conn., 487;
Wallace v. *Clayton*, 42 Ga., 443;
R. R. Co. v. *White*, 88 Ga., 805;
Merritt v. *Earle*, 29 N. Y., 115, l. c. 116f;
Michaels v. *R. R. Co.*, 30 N. Y., 564, l. c. 570;
Bibb Broom Corn Co. v. *A. T. & S. F. Ry. Co.*, 102 N. W. Rep. (Minn. Sup. Ct.), p. 709;
R. R. Co. v. *Curtiss*, 80 Ill., 324;

Wald v. *R. R. Co.*, 162 Ill., 545;
Blodgett v. *Abbott*, 72 Wis., 516;
Nelson v. *Ry. Co.*, 72 Pac. Rep. (Mon. Sup. Ct.), 643, l. c. 651;
Steamboat Co. v. *Tiers*, 24 N. J. Law Rep., 697;
R. R. Co. v. *David*, 6 Heisk, 261;
McGraw v. *R. R. Co.*, 18 W. Va., 361;
Smith v. *Ry. Co.*, 91 Ala, 455, l. c. 456;
Coosa Steamboat Co. v. *Barclay*, 30 Ala., 12, l. c. 127;
Nugent v. *Smith*, 1 C. P. Div., 19 and 423;
Vol. 1 Am. & Eng. Enc. Law (2nd Ed.), 595;
Vol. 5 Am. & Eng. Enc. Law (2nd Ed.), 234;
Hutchinson on Carriers, Secs. 181, 187, 188;
Vol. 6 Cyc. Law & Proced., 377, 384;
Strauss v. *Ry. Co.*, 17 Fed. Rep., 209, l. c. 212;
Caldwell v. *Sou. Ex. Co.*, 4 Fed. Cas. No. 2303, p. 1036.
Thompkins v. *Duches of Ulster*, 24 Fed. Cas. No. 14087a, p. 32;
Southern Pac. Co. v. *Schoer*, 52 C. C. A., 269, l. c. 274;
Newport News Co. v. *U. S.*, 9 C. C. A., 579;
Clark v. *Barnwell*, 12 How., 272; l. c. 280;
Holladay v. *Kennard*, 12 Wall., 254;
Gleason v. *R. R. Co.*, 140 U. S., 433;
The Majestic, 166 U. S., 376, l. c. 386.

Petitioners further represent, that their counsel in the Court of Appeals in this case, in their brief in support of the proposition that the question of what was the proximate cause of the loss in this case and whether it was the carrier's negligence or whether it was solely the act of God, as claimed by the carrier, were questions of fact for trial by the jury, and in support of that proposition the case of *Milwaukee & St. Paul* v. *Kellogg*, 94

U. S., 469, was cited. And in the brief of counsel of petitioners in the Court of Appeals, in support of the proposition that the questions of negligence in this case were questions of fact to be decided by the jury, the following cases were cited:

R. R. Co. v. *Stout,* 17 Wall., 657, l. c. 653;
Ry. Co. v. *McDonald,* 152 U. S., 662, l. c. 275;
Marande v. *R. R. Co.,* 184 U. S., 173.

It is thus seen that in this case two issues were involved, both in the Court of Appeals and in the trial court, which, as already stated, were the issues of the carrier's liability on the grounds of deviation and negligence. The liability of the carrier in this case on each of those grounds stands separate and wholly apart from its liability on the other ground. The carrier in this case might be liable on the ground of deviation and not liable on the ground of negligence, or it might be liable on the grounds of negligence and not be liable on the ground of deviation. The carrier in this case might be liable on both grounds. The decision in this case of either question of liability, namely, deviation or negligence, is not in the nature of things a decision of the other question.

The question of liability on the ground of deviation was a law question, pure and simple. In this case the deviation was without plaintiffs' consent and without any consultation with plaintiffs. And the question of liability of the defendant carrier in this case on the ground of deviation, being a law question, pure and simple, there was no other way for the petitioners in the trial court to reach and obtain a proper determination of that question except to ask, as they did ask, a peremptory instruction to the jury based on that legal proposition of liability.

Since the questions of negligence were questions of fact, triable by the jury, there was no way under the law,

since there was not a waiver of the jury trial in the case, for a decision of the questions of negligence except by the jury. Therefore petitioners in asking the court to give a peremptory instruction to the jury, on the basis of liability founded on deviation and at the same time asking the court to give certain instructions on the propositions of negligence, was simply asking the court to pass upon all of the law questions in the case.

As we have already seen, in the case of *Beuttell* v. *Magone,* 157 U. S. 154, and in the other Court of Appeals cases cited in the opinion of the court in this case, there was but a single issue, but if the rule adjudged by the Court of Appeals in its opinion in this case is erroneous and unjust as applied to a case where the plaintiff rests his case on a single proposition of fact, how much more would that result be true in the case at bar, where the liability is claimed on two grounds.

It is undoubtedly true, petitioners say, that while a decision of the case in favor of the plaintiffs on the ground of deviation would absolve the court from the necessity of a decision on the question of negligence, still judgment against the plaintiffs cannot be given in this case without a decision against them of both questions of deviation and negligence. Petitioners had the right to the trial of both issues by the aforesaid tribunals of judge and jury before a final judgment could be given against them. The trial court in this case assumed to decide and did decide both issues of deviation and negligence against the petitioners.

Our contention in the Court of Appeals was, that the decision of the trial court on the question of deviation was against the unbroken authorities applicable to the question of deviation in such cases, and that the trial court, in taking the case from the jury on the questions of negligence, usurped the province of the jury.

However, the Court of Appeals practically refused to decide either question of deviation or negligence, because, as held by the Court of Appeals, petitioners had lost their rights as litigants in the case by asking the trial court to decide all the law questions in the case arising on both issues. If the rule sanctioned by the Court of Appeals in this case becomes the rule applicable to all such cases, it would seem that the result would follow that because a litigant in the trial court asks the court to decide all the law questions in the case, the Court of Appeals on becoming possessed of the case will be prevented from saying anything more in an opinion in the case than if without any consideration of the case the word "affirmed" only were written therein.

In view of the conflict between the decision of this Court of Appeals in this case and the other decisions referred to, state and federal, we submit that in harmony with the decision of this court in *Forsythe* v. *Hammond*, 166 U. S., 506, the writ of *certiorari* prayed for by this petition is the proper remedy to settle the conflict made by this decision. If the decision of the Court of Appeals in this case on this question of practice is correct and is important to every litigant and lawyer in this country, this court ought, we submit, to grant this writ of *certiorari* and on the hearing of this case overrule the decisions of the other Circuit Courts of Appeals with which the decision in this case is in conflict. If, on the other hand, this court is of opinion that the decisions referred to of the other Circuit Courts of Appeals and of the Court of Appeals of New York are correct, then we submit that this court on the hearing of this case should so decide, in order to settle the conflict. A duly certified copy of the entire record in this cause in said Court of Appeals, and the number of uncertified copies required by the rules of this court, accompany this petition and are filed herewith as a part of this petition.

Petitioners pray this court to grant the writ of *certiorari* herein to said Circuit Court of Appeals of the Eighth Circuit and on the hearing and decision of this case by this court that this court will reverse the decisions and judgments of the said Circuit Court and of the said Circuit Court of Appeals herein and remand this case to the Circuit Court for a new trial on both the issues of deviation and negligence.

James S. Botsford
and R. E. Ball

.....

Attorneys for Petitioners.

State of Missouri, County of Jackson, ss.

James S. Botsford, being duly sworn, on his oath states, that he is one of the attorneys of petitioners in this case, and has been in both the Circuit Court and the Court of Appeals; that he has read the foregoing petition and that the matters set forth therein are true, as he verily believes.

James S. Botsford

Sworn to and subscribed before me this 14th day of December, 1906.

My commission expires November 24, 1908

Vinnie A. Thomas

Notary Public.

IN THE

Supreme Court of the United States.

EMPIRE STATE CATTLE COMPANY, a corporation; W. E. WAITE, E. F. WAITE, W. H. FROST, P. H. KELLOGG, C. L. MILLETT and J. D. CARR, *Petitioners,*	No. .....
vs.	
THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, *Respondent,*	

ANSWER IN OPPOSITION TO PETITION OF PETITIONERS FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

For answer to the petition of petitioners for a writ of *certiorari* proposed to be made to this Honorable Court, the respondent, The Atchison, Topeka and Santa Fe Railway Company, respectfully represents and shows as follows:

It is obvious from the elaborate petition filed that petitioners seek to have a review by this court of some six hundred pages of evidence, much of which the trial court admitted in its opinion was irrelevant and im-

material to the issues, and it is apparent that it is the main desire of petitioners to have the judgment of this court upon the sufficiency of the evidence in the record to sustain the verdict and judgment in the trial court in addition to the views of the trial court and that of the Court of Appeals upon such question. This application is based mainly upon the ground that the decision of a majority of the Court of Appeals as to the effect of a submission of a case under the evidence to the court in a common law action is contrary to the rulings of other circuits.

While in suits in equity and admiralty causes the practice in the Federal courts throughout the United States is required to be uniform, and rulings in respect to such practice may, therefore, be important, yet it is well known that in trials at common law in the Federal courts, by virtue of the Act of Congress upon that subject (Sec. 914, U. S. Rev. Stat.), the practice is to accord as nearly as possible with the practice which obtains in the State courts of the State in which such Federal court may be sitting. There can, therefore, be no uniformity of practice throughout the Union in respect to trials at common law. We understand, of course, that the Act of Congress does not require the Federal courts to conform in all respects to the practice in the State courts in respect to common law cases, yet it is well known that the practice of the Federal courts in respect to such cases does differ, and differs materially, in the different circuits. The point involved is, therefore, not one which concerns practitioners throughout the United States, and is not one of general importance.

In re Woods, Petitioner, 143 U. S., 202.

It is quite obvious that if the contention of our adversaries were sustained upon the grounds claimed as an inducement for the issuance of the writ of *certiorari*, the same pretext would be frequently resorted to in a vast number of common law cases, and this court would be overwhelmed with reviewing not important questions of law but rather the merits of causes as disclosed by the evidence introduced. Obviously, this court must rather be concerned to know that substantial justice has been administered, than that some technical rule of practice has been correctly laid down or followed.

So far as the evidence or the merits in the case at bar are concerned, it is quite obvious that petitioners have had already the consideration of those courts which Congress intended such litigants should have.

Petitioners are not, however, even fair or candid in the statement of the record and the points involved. The ruling of the Circuit Court of Appeals, affirming the instruction of the trial court, directing a verdict for the defendant, is reported in the case of *Empire State Cattle Company et al.* v. *The Atchison, Topeka and Santa Fe Railway*, 147 Fed., 457, from which it appears that in the concurring opinion of Judge Sanborn, he was of opinion that the direction of the verdict under the evidence was correct, and that there was no prejudicial error committed.

It is a well settled rule in the Federal courts that it is the duty of the trial judge to direct a verdict in favor of a party when, if the verdict were against such party as rendered by the jury, it would be the duty of the court to set the same aside and grant a new

trial, and, therefore, the court may withdraw a case from the jury altogether and direct a verdict for plaintiff or defendant, as the one or the other may be proper, where the evidence is undisputed or of such conclusive character that the court in the exercise of a sound judicial discretion would be compelled to set aside a verdict in opposition to it.

Southern Pacific Company v. *Pool*, 160 U. S., 440.

Marande v. *Railroad Company*, 184 U. S., 191, and

Bowditch v. *Boston*, 101 U. S., 18.

This is the undoubted rule in the Eighth Circuit, where the case was tried:

Christenson v. *Metropolitan Street Ry. Co.*, 137 Fed., 708.

The direction of the trial court being correct, under the above well settled rule, it should not be disturbed.

The record, however, in the case under consideration discloses on page 637, the following:

"And thereupon upon the conclusion of all the evidence in the case, the plaintiffs prayed the court to instruct the jury as follows:

"'The court instructs the jury to *find the issues for the plaintiffs'*; which instruction the court refused to give, and to which action, ruling and decision of the court in refusing to give said instruction, the plaintiffs at the time duly excepted."

The defendant requested a similar instruction in its favor. (See record, pp. 27 and 26, for requests for peremptory instructions filed, submitted and overruled.) It is obvious from the "Memoranda of decision on request for peremptory instructions," found

on pages 645 to 655, and which is made a part of the record in the bill of exceptions, that the two instructions were submitted together and disposed of by the court. On page 655 of the record it is stated at the end of the decision:

"It therefore follows on the main case, the request for instructions to the jury to return a verdict for the defendant must be sustained, and the like request of plaintiffs must be denied. This will be done. And thereupon the court, on the motion of the defendant, gave final judgment in favor of the defendant and against these plaintiffs."

It, therefore, appears from page 637 of the record that the plaintiffs asked the court to direct the jury to find the issues for plaintiffs, and *after* this instruction or motion had been refused, as shown by the memoranda of decision, that "*thereupon* the plaintiffs prayed the court to give to the jury the following instructions" (Rec., p. 638), and there are then set out some thirteen instructions requested, the refusal to give any one of which instructions was not properly assigned as error for the consideration of the Court of Appeals, and must, therefore, be regarded as having been abandoned, or that each request was incorrect or erroneous and therefore properly refused.

It, therefore, fairly appears from the record that plaintiffs did not ask to go to the jury upon any special question of fact until after the cause had been submitted to the court and the court had plainly found the issues against plaintiffs and directed a verdict.

Moreover, owing to failure to properly assign error, there was not for the consideration of the Court of Appeals any request of plaintiffs to submit the case to the jury upon any question of fact.

The third assignment of error (Rec., 658) is as follows:

"The court erred, *after the refusal of said peremptory instruction*, in refusing to give and charge the jury, at plaintiffs' request, instructions numbered as follows and in refusing to give each of them, to-wit: Instructions 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12 and 13."

Under rule 11 of the Court of Appeals, as well as under the rule of this court, each error assigned must be specifically set out under a separate assignment so as to advise the opposite counsel and the court of the particular legal points relied upon for a reversal of the trial court.

Van Stone v. *Stillwell & Bierce Mfg. Co.*, 142 U. S., 128.

Supreme Council C. K. of A. v. *Fidelity & Casualty Co. of New York*, 11 C. C. A., 96.

Lloyd v. *Chapman*, 93 Fed., 599, and

United States ex rel. Coquard v. *Indian Grave Drainage District*, 85 Fed., 928 and 932.

It was not obligatory upon the court or counsel for the defendant to search each of these requests and point out error in the same, justifying a refusal of the court to give it. No particular error in refusal to give any one of these special requests was pointed out even in the brief of plaintiffs in error in the appellate court. Thus, it could be readily shown that the fifth request, found on pages 639 and 640 of the record, in regard to alleged deviation of the shipment, is clearly erroneous and was properly refused. The only alleged errors, therefore, properly assigned and which were for the consideration of the Circuit Court of Appeals were refusal of the trial court to give plaintiffs'

peremptory instruction and the giving of defendant's peremptory instruction.

There is, however, as we shall show, no conflict in the decisions of the Federal courts so far as the actual decision is concerned upon this question. Some expressions in the nature of dicta in a few of the cases may, perhaps, show contrary views, but wherever the question has been decided by the courts, such decisions have rather been in harmony with the majority opinion of the Court of Appeals in this case.

From the record it plainly appears that both plaintiffs and defendant submitted the entire case to the court to determine the facts under the evidence and the law applicable thereto as to whether the verdict and judgment should be for the plaintiffs or for the defendant. While plaintiffs urged in their petition several grounds of negligence, there was but one cause of action, and the plaintiffs contended that upon all the evidence they were entitled to a verdict and judgment upon this cause of action, while the defendant contended that the verdict and judgment should be in its favor.

A motion for an instruction to find a verdict for a party has superseded the old practice of a demurrer to the evidence, but is nevertheless analogous thereto.

Merrick's Executor v. *Giddings,* 115 U. S., 305.

Parks v. *Ross,* 11 Howard, 373.

The plaintiffs did not, in their peremptory instruction, submit the case upon any particular point or question, but joined with the defendant in submitting the entire case upon all the evidence to the court.

In *Beuttell* v. *Magone,* 157 U. S., 154, it is said:

"As, however, both parties asked the court to instruct a verdict, both affirmed that there was no disputed question of fact which could operate to deflect or control the question of law. This was necessarily a request that the court find the facts, and the parties are, therefore, concluded by the finding made by the court, upon which the resulting instruction of law was given. The facts having been thus submitted to the court, we are limited in reviewing its action, to the consideration of the correctness of the finding on the law, and must affirm if there be any evidence in support thereof."

See, also, *Johnson's Admr.* v. *Chesapeake & Ohio Ry. Co.,* 21 S. E., 238.

Having thus submitted the case to the court to determine the facts from the evidence, and the court having acted upon such request and decided the questions of law and fact, plaintiffs were not in a position to insist that such submission should be ignored or withdrawn, and that the case should then be submitted to the jury to determine some particular question of fact. Such was the ruling of the Circuit Court of Appeals, for the Seventh Circuit, in *Insurance Company* v. *Wisconsin Central Railway Company,* 134 Fed., 794 and 798. See, also, *Nashville, C. & St. L. Ry. Co.* v. *Sansom,* 84 S. W., 615 and 616. Such also was the ruling of the New York Court of Appeals in *Howell* v. *Wright,* 25 N. E., 912. In none of the cases from the Federal courts cited by petitioners has a different decision been made.

In *Sigua Iron Co.* v. *Greene,* 31 C. C. A., 477, motions by both parties for a verdict were denied and the court, over the exception of one party, submitted

a single issue of fact to the jury. In *Merwin* v. *Magone,* 17 C. C. A., 361, and in *Magone* v. *Origet,* 17 C. C. A., 363, the direction of a verdict by the trial court was affirmed. The same is true of the case of *Chrystie* v. *Foster,* 9 C. C. A., 606.

The case of *Minahan* v. *Grand Trunk W. Ry. Co.,* 138 Fed., 37, is distinguishable. There, in an action where the facts were not conceded, plaintiff interrupted the court as it was passing on a motion to direct a verdict for the defendant, and asked leave to file certain requests to charge the jury, one of which was a request for a peremptory instruction for plaintiff. The court permitted such requests to be filed and assured counsel that he should have the benefit of them, it was held that this did not amount to a submission of the issues of fact to the court so that plaintiff was precluded from objecting to an adverse finding thereon. Plaintiff in that case plainly indicated that the case was not intended to be submitted to the court for its decision only upon the peremptory instruction, and it appeared that the evidence was quite conflicting on material points. Moreover, the court is at pains to point out that its decision was in accordance with the practice of Michigan, where the case was tried.

A request to go to the jury must specifically point out the question of fact upon which its judgment is desired. It is settled even in the New York courts that a request must be in such form that the judge may properly charge in the terms of the request, without qualification.

Carpenter v. *Stillwell,* 11 N. Y., 61 and 79.
Winchell v. *Hicks,* 18 N. Y., 565.

Van Akin v. *Caler,* 48 Barbour's Supreme Court Rep., 60 and 61.
Waters v. *Marrin,* 13 Daly's Reports, 57.

Therefore, even according to the rule of practice in the New York courts, whose decisions are relied upon by petitioners, where both parties ask for the direction of a verdict, a motion by one of them to withdraw his request and to go to the jury on all the questions in the case will not be granted.

Groves v. *Acker,* 33 N. Y. Sup., 406; 85 Hun., 492.

By having failed to assign error in the refusal to give any one of the thirteen specific instructions afterwards requested by plaintiffs, plaintiffs must be deemed to have abandoned any question in regard to the same and certainly to have waived their right to predicate any error upon the refusal of the trial court to give any one of such instructions. They cannot, therefore, now claim that they were entitled to go to the jury upon any particular question of fact, since it does not appear, and they were not able to show, that any specific request in respect to the submission of any such question of fact was properly made. The result now is that they are simply claiming that, after the court overruled their peremptory request and directed a verdict in favor of the defendant, the court erred in not submitting the case generally to the jury. There was, therefore, no question before the Court of Appeals, and there can be none before this court in respect to any improper refusal of the trial court to submit to the jury at the request of the plaintiffs some particular

question of fact for its determination. As, under this rule, no such request was up for consideration of the Court of Appeals, there can be none for the consideration of this court on an application for a writ of *certiorari*. It is to be presumed that the action of the lower courts was rightful.

A rather extended presentation is made by petitioners of what some of the evidence purports to show. Here, again, we regret we are called upon to say that in many instances but half the truth is stated, which is as misleading as a positive misstatement. In some instances conclusions are stated wholly unwarranted and unjustified by anything in the record. We do not deem it proper to refer to the evidence in detail. The facts stated in the opinion of the trial court, found in the record on pages 645 to 655, inclusive, were conclusively established by the uncontradicted evidence in the case.

The action was to recover damages for the alleged negligence of the defendant by reason of which plaintiff's cattle, which were being transported, were overcome and damaged while in the Union Stock Yards at Kansas City, Missouri, by what the plaintiffs stated, in their petition, was an unprecedented flood in that vicinity or locality. Recovery is based in the petition upon several grounds of alleged negligence, as follows (Rec., pp. 7 and 8):

"Plaintiffs further state that it was the duty of said defendant as such railway company and common carrier to *exercise due and reasonable care* in the carriage and transportation of said cattle from Amarillo, Texas, to said Atchison, Kansas, but that defendant was guilty of *negligence* in the following particulars, to-wit:

"(1) Defendant did not exercise due and reasonable care, but was negligent in the detention of said cattle at Strong City from May 27th, 1903, to May 29th, 1903, and in not carrying and transporting on May 27th, 1903, said cattle from said Strong City, Kansas, to Atchison, Kansas, by way of Topeka, Kansas, so that said cattle might have been, by defendant at said Atchison, Kansas, delivered to the continuing and connecting carrier at that point.

(2) Defendant did not exercise due and reasonable care in the transportation and carriage of said cattle but was negligent in not detaining said cattle at Strong City, Kansas, on said May 29th, 1903, until the said *unprecedented* flood in said Kaw river had subsided so that the transit of said cattle might be safely resumed without liability to damage or injury thereto.

(3) Said defendant did not exercise due and reasonable care, but was negligent and acted wrongfully and without plaintiffs' consent in the deviation of the shipment of said cattle by defendant to Kansas City from which last point and city defendant had and has no connecting line extending to Atchison, Kansas.

(4) Defendant did not exercise due and reasonable care in the transportation and carriage of said cattle by carelessly and negligently endeavoring to head off the flood of said Kaw river by landing and depositing said cattle in the pens on the bank of said Kaw river at the mouth thereof several days after the rise and increase of the flood of said Kaw river. And plaintiffs say that defendant, by its agents and servants in charge of the transportation of said cattle of plaintiffs had actual knowledge of said flood from said May 27th, 1903, and well knew of said flood and of the continued rise and increase thereof on said May 30th, 1903, when said defendant so deposited said cattle of plaintiffs in said pens by the side of said Kaw river at the mouth thereof.

(5) That defendant having wrongfully transported said cattle to Kansas City, as aforesaid, carelessly and negligently failed and neglected to move or

cause to be moved the same from their position of peril, aforesaid, at Kansas City, Missouri, as defendant had reasonable time and opportunity to do before the arrival at said Kansas City of said flood, but the same were overtaken by said flood.

(6) Defendant did not exercise due and reasonable care, but was negligent in not properly or sufficiently feeding or watering said cattle before loading the same at said Strong City, Kansas, and while said cattle were in the viaducts at Kansas City.

Plaintiffs further state that said several injuries, damages and losses to and of said cattle hereinbefore specified and set out were each and all caused by the *said several negligencies and want of due and reasonable care* in the transportation and carriage of said cattle by defendant."

It was set up in defendant's answer (Rec., 9-10-11), and admitted under the pleadings under the Kansas practice, that the cattle in question were being transported in pursuance of the written live stock contracts made by The Pecos & Northern Texas Railway Company on behalf of itself and connecting carriers from Hereford, Texas, to Evarts, South Dakota (Rec., 12 to 19.) In these contracts no route was specified. The initial line simply undertook to carry over its road and deliver to some connecting carrier, and each carrier receiving the stock was to carry over its road and deliver to some succeeding connecting carrier. Each company was relieved from any injury or loss sustained by reason of delay in the transportation. The provisions of these contracts were to inure to the benefit of each carrier which should receive and transport the shipments. (Rec., 12 to 19.) The Pecos & Northern Texas Railway extended from the point of shipment, Hereford, Texas, to Amarillo, Texas, where

it connected with the railway operated by The Southern Kansas Railway Company of Texas, whose line of road extended to Higgins, Texas, on the state line between Texas and Oklahoma. There the railway of the defendant connected with the Southern Kansas Company's line. One of the defendant's lines extended by way of Strong City, Emporia and Topeka, in Kansas, to Atchison, Kansas; another of its lines extended from Topeka, down the Kaw river, to the Union Stock Yards in Kansas City, Missouri; and a cut off extended from Emporia by way of Ottawa to the Union Stock Yards in Kansas City. At such stock yards its rails connected with the railroad of the Missouri Pacific Railway Company, among others, whose railroad extended by way of Atchison, to Omaha and other points and by other connections the stock could have been transported that way to Evarts, South Dakota, or the stock might have been transported by way of Atchison where a connection was formed with the Burlington Railroad and others extending to said Evarts. Under normal conditions the defendant, for its own benefit, would have transported, as it would have preferred to do, the cattle by way of Topeka and Atchison and made delivery to the Burlington road at Atchison. (Rec., 173-174, 203.) There is no evidence to show, however, that any such line or route was indicated or requested by the shippers or plaintiffs, and it appears to have been merely a route selected by the carriers themselves for their own convenience. (Rec., 120.) The endorsement found on the back of the live stock contract, "Hereford, Texas, to Atchison, Kansas," was evidently placed thereon

by the agent of the initial carrier on behalf of the carriers themselves. It is not in or a part of the contract of carriage. (Rec., 12-19.) In the "way-bills" issued by the initial carrier, and which were intended to be delivered to its train agents and those of the succeeding carriers, the line of transportation is designated by way of Amarillo and Atchison (Rec., 120); but these way bills were not delivered to the shippers, being merely made out by the carriers for the guidance of their own agents. They were not bills of lading or akin thereto. The evidence, therefore, did not show any instructions from the shippers as to the route to be taken, and the agreement between the carriers and the shippers specified no route. There was no agreement to transport by any particular lines or routes. (Rec., 12-19.) The shippers evidently were only interested in the through rate which was the same by several lines, and in a reasonable expeditious transportation under the circumstances.

As the shipment moved, the defendant had arranged with the Burlington road to receive the same at Atchison. (Rec., 41.) When the shipment arrived at Strong City, however, defendant received word from the Burlington road that it would be unable to receive it at Atchison, on account of washouts beyond that point upon its own line. (Rec., 34, 35, 179, 448, 183, 185.) There were no adequate stock yards at Atchison at which such a large shipment could be held any length of time. (Rec., 199.) Thereupon defendant, in order to expedite the shipment, began negotiations with other railroads to receive the shipment and, among others, the Missouri Pacific at Kansas City. (Rec., 185, 186, 187, 188, 193, 194.) Before negotia-

tions were closed, the Burlington road advised defendant that its line was again open and it could receive the cattle at Atchison. (Rec., 182 and 452.) It then transpired, however, that a part of defendant's line of railroad between Topeka and Atchison was flooded with water so as to be impassible (Rec., 196), and another washout had occurred upon the Burlington road. (Rec., 196.) Defendant then closed, as it supposed, negotiations with the Missouri Pacific Company to receive the cattle at the Union Stock Yards in Kansas City and to transport the same by way of Atchison and deliver to some connecting carrier at the end of its line, to be carried to Evarts, South Dakota. (Rec., 185, 186, 188, 187, 188, 189, 193, 192, 194.)

As a part of its line of railroad between Topeka and Kansas City was also now under water (Rec., 201) defendant loaded the shipment finally on May 29th and began to transport the same by way of the Ottawa cut off. (Rec., 203, 204.) Agents of the plaintiffs in charge of the shipment were becoming impatient at the delay and wanted the shipments sent around the flooded area. (Rec., 73, 74.) When the stock reached Olathe it was found necessary to use the railroad tracks of the St. Louis & San Francisco Railroad Company so as to run the shipment into the stock yards at Kansas City (Rec., 208 and 211) where the cattle arrived on the 30th of May (Rec., 473, 474, 494, 520, 629, 630, 632, 633, 634), and the same were deposited in the pens set apart for the use of the Missouri Pacific Railway Company. (Rec., 551, 475, 522, 509, 648, 649.) The stock was then in the custody of the agents of the Union Stock Yards Company. (Rec., 533, 542.)

The mere flooding of portions of defendant's tracks west of Kansas City was not unprecedented. The low portions of such tracks had been flooded before during high rises in the river. This did not indicate any danger at the Stock Yards. These Stock Yards had never been known to have been flooded before by any rise in the river.

An extraordinary rain fall, commencing on May 28th, in middle western and northern Kansas, accompanied with the saturated condition of the soil by previous rains, caused a flood in the Kansas river to manifest itself at Kansas City on the night of May 30th and 31st so as to reach an extraordinary and unprecedented height, and resulted in a rise of the river at that time to a height unknown before. Up to that time everyone supposed that the Stock Yards and the tracks in that vicinity were and would be safe. They were safe in that vicinity on the 30th, as Mr. Kendrick, an agent of the Burlington road, testified for plaintiffs that that railroad received and moved stock at these Stock Yards on May 30th (Rec., 284) northward and would have been willing to receive this stock and move the same up the Missouri river by way of Atchison, though, of course, it then appeared, as is clearly shown by the record, though not stated by petitioners, that defendant company had made arrangements with the Missouri Pacific to receive the shipments at the Union Stock Yards and move the same out, and the shipment was waiting on the Missouri Pacific, so that the defendant company could not make different arrangements at that time with the Burlington road.

On the night of the 30th and the morning of the 31st the Kansas river at this point rose so high as to submerge a portion of the stock yards (Rec., 603, 596) so that the agents of the Stock Yards Company found it necessary to drive the cattle upon the viaduct in these yards to prevent the cattle drowning. The water rose to a height of eight feet in the yards, and, contrary to all expectations, remained, submerging the stock yards for several days, thereby causing the loss complained of. At no previous flood known of had the waters of the Kansas river ever submerged the stock yards. (Rec., 552, 564, 576, 529, 596.) The flood waters in that locality were not only unprecedented but wholly unexpected, entailing a loss of millions of dollars of property located in what is known as the "bottoms" in that vicinity. It has become historic, so the court might have taken judicial notice of it. It was passed upon by the Kansas City Court of Appeals in *Moffatt* v. *U. P. Rld.*, 88 S. W. R., 117. (Rec., 565, 558, 559, 604, 555, 560, 570, 91.) In the light of what had been known up to that time, the agents of defendant in charge of this transportation acted not only in the best faith, but with due diligence and with what everyone would then have supposed to have been for the best interests of the plaintiffs. Those in charge of the stock for the plaintiffs at no time made any objections or gave any different directions. On the contrary, Frost, the president of the Empire Company complained of the delay (Rec., 74), and asked the defendant to run the cattle around the flooded area (Rec., 74), which left available only the line by way of Kansis City. Viewed in the light of what afterward transpired and of knowledge acquired by subsequent

events, of course, either a dull school boy or an astute lawyer could very easily point out that if some other course had been pursued the damage would not have been occasioned.

It is now claimed that if the cattle had been held longer at Strong City or Emporia, the damage would not have occurred, and that the defendant was negligent in not so doing. It is also complained that defendant was negligent in delaying the cattle for a couple of days at Strong City while it was negotiating with some connecting carrier to receive the shipment at the end of one of its lines. It is also now claimed that the heavy rains at the head waters of the Kansas river 400 to 500 miles from its mouth had so saturated the ground during the early part of the month that when, toward the end of the month, a down pour occurred all the water ran off into the rivulets and into the river, and the defendant should have been able to calculate with mathematical nicety and certainty, with a knowledge of the geological conditions and the varied contour of several hundred miles of territory, that the flood waters would have risen at the stock yards at Kansas City to a height never known before.

The flood which did the damage and which is alleged to have been unprecedented occurred suddenly and is characterized by our opponents as in the nature of a tidal wave. It came on in the night time and was at its height on the morning of May 31st.

Great liberality was allowed in the admission of evidence, much of which the trial court regarded as having no bearing upon the issues. The fact that it

was shown that one man had driven a pack of mules out of mule pens somewhere in that vicinity through the city to the uplands was not at all important, because these cattle could not have been driven out of the pens and through the crowded streets, and the viaducts in the stock yards seemed to be the safest place after all, as any one might well suppose that the flood would recede as rapidly as it came on.

See

Grier v. *St. Louis Merchants Bridge Terminal Ry. Co.*, 84 S. W., 158.

The agents of the Stock Yards Company used all the foresight and diligence that could have been expected under the circumstances. Millions of dollars worth of property in the locality was destroyed by the flood because the same had not been removed. (Rec., 565, 558, 559, 604, 555, 560, 570, 91.)

It is incorrect for plaintiffs to say that the shipping contract of the parties specified transportation over the defendant's railroad by way of Atchison rather than by way of Kansas City, or that there was any deviation from the shipping contract. The fact that defendant used certain tracks of the St. Louis & San Francisco Railroad Company in transporting the shipment from Olathe, Kansas, to Kansas City, Missouri, was wholly immaterial, since, in any event, no loss or damage occurred while the cattle were being transported that way. It appeared that that was the only available route then open when the stock reached Olathe to get it to the stock yards at Kansas City. At the stock yards it got upon its own line of railroad.

The statement of petitioners, that "the defendant company in starting such shipment from Strong City and in deviating the same from said Emporia *knowingly and willfully* went into the mouth of the flood at its climax," is wholly unwarranted by and directly contrary to the evidence in the case. The statement that the different agents of the defendant gave no care to the stock while it was in the stock yards is, of course, misleading. It was not necessary that the General Manager, or certain other agents of the defendant railway company, should be looking after this stock, because the cattle were being cared for and attended to by the agents of the Union Stock Yards Company and were receiving all the care that could be given them under the circumstances. Defendant had the right to suppose, as this was the usual and customary place for making deliveries to the Missouri Pacific Railway Company, that the stock would be cared for by the agents of the Union Stock Yards Company on behalf of itself as well as the Missouri Pacific Railway Company. Petitioners seem to think that their shipment was the only one on the railroad or which required any attention. This is but an illustration of the mode of argument adopted by our opponents.

So, also, the statement that this shipment and the shipment in the companion case of the Minnesota & Dakota Cattle Company were the only ones in the stock yards at the time is incorrect, and directly contrary to the evidence (Rec., 258) and to the allegation in plaintiffs' petition, that their cattle were mingled with other stock upon the viaduct during the flood.

The foregoing will suffice to show that the defense, that the damage was occasioned by an act of God,—an unprecedented and unusual flood, for the consequences of which the defendant could not be held liable, and that this was the proximate cause of the loss suffered, was virtually admitted in the statements in plaintiffs' petition, and was conclusively proved by the evidence in the case. The grounds urged by plaintiffs were, therefore, untenable. The ground of alleged wrongful deviation was a straw afterward seized upon in the hope of sustaining their case. Until plaintiffs were confronted with the Federal decisions they fondly hoped that the detention of the cattle at Strong City for a couple of days was negligent, and that the same was the proximate cause of the animals being subsequently overtaken by the flood at Kansas City, and, therefore, the cause of the damage. Such detention was not even negligent under the circumstances; but, even if negligent, it was not the efficient or proximate cause of the damage. It was merely one of a series of independent events which resulted in succeeding events bringing the shipment in the vicinity of an unexpected disaster. It might just as logically be claimed that if a man walking along the street were struck by lightning, the cause of his death would be his walking along the street. The rule is well settled that such antecedent negligent delay, which may have resulted in the goods being subsequently brought in proximity of an unprecedented flood, cannot be regarded as the proximate cause of the damage, but is altogether too remote.

Railroad Company v. *Reeves*, 10 Wallace, 176.
St. Louis, etc., Ry. v. *Commercial Ins. Co.*, 139 U. S., 237.

See also

Volume 7, Rose's Notes in U. S, Reports to Reeves' case, pages 297 and 298.

Hutchinson on Carriers, 2nd Edition by Mechem, Sections 193, 194 and 195.

Vol. 5, American & English Encyclopaedia of Law, 2nd Edition, pages 259 and 260.

The same ruling was made with reference to this very flood, concerning a similar loss at Kansas City, by the Kansas City Court of Appeals in *Moffatt Com. Co.* v. *U. P. R. R.*, 88 S. W., 117; and in *Woolsey Stahl Hay Co.* v. *Mo. Pac. Rly.*, 88 S. W., 1134.

See also,

Morrison v. *Davis*, 20 Pa. St., 171.

Denny v. *N. Y. Cent. R. R. Co.*, 13 Gray., 481.

Hoadley v. *Northern Trans. Co.*, 115 Mass., 304.

McClary v. *Sioux City Railroad*, 3 Neb., 44; 19 Am. Rep., 631.

Michigan Cent. R. R. v. *Burrows*, 33 Mich., 6.

Daniels v. *Ballantine*, 23 Oh. St., 532.

Clark v. *Pacific Railroad Co.*, 39 Mo., 184.

Herring v. *Chesapeake, etc., R. R.*, 45 S. E., 322; same case, 101 Va., 778.

Gilson v. *Delaware, etc., Canal Co.*, 65 Vt., 213; same case, 36 Am. St. Rep., 838 and 839 and notes, s. c., 26 Atl., 70.

The Startle, 115 Fed., 560.

13 American & English Encylopaedia of Law, 2nd Edition, page 722.

There was no case here presented of concurring

negligence of the defendant still potential and existing at the time of the operation of the act of God, so that it might be contended that such negligence was an existing, present and efficient cause also of the damage and without which the damage would not have occurred, as was the case of *The Majestic,* 166 U. S., 376, cited by our opponents, where baggage was flooded with water which came through a defective or broken port hole of the steamer, and which the evidence showed was not securely covered and had not been examined. As the carrier knew that a storm upon the sea, which was likely to occur, would cause water to flow through a defective port hole, it was held that care should have been taken to see that the vessel was seaworthy in that respect.

When it was shown or admitted that the damage was caused by an unpresedented flood of this character, the burden was then shifted to the plaintiffs to show some subsequent negligent or wrongful act of defendant which intervened so as to be the direct or proximate cause.

Railroad Company v. *Reeves,* 10 Wallace, 176.

Nashville & Chattanooga R. R. Co. v. *David,* 6 Heisk., 261; s. c., 19 Am. Rep., 594.

Washburn—Crosby Co. v. *William Johnston & Co., Ltd.,* 125 Fed., 273.

Cau v. *Texas & Pacific R. Co.,* 194 U. S., 427.

4 Elliott on Railroads, p. 2348, sec. 1516, note 3.

The conduct of the defendant is to be judged solely in the light of that which was apparent to an ordinary

person at the time it acted and not by that *ex post facto* wisdom obtained by what afterward transpired and which could not have been expected because admitted to have been unprecedented.

Grier v. *St. Louis Merchants Bridge Ter. Ry. Co.*, 84 S. W., 158.

American Express Company v. *Smith*, 33 Oh. St., 511; s. c., 31 Am. Rep., 561.

Libby v. *Maine, etc., Ry. Co.*, 20 L. R. A., 812.

Baltimore. etc., R. R. Co. v. *School District*, 96 Pa. St., 65; s. c., 42 Am. Rep., 529.

In a case cited by our opponents (*Wallace* v. *Clayton*, 42 Ga., 443), which is based on a provision of the Georgia Code, requiring common carriers to "use extraordinary judgment," it was nevertheless said:

"There was not a moment after the flood got beyond the highest ever known before when they did not have the right to suppose that the limit of the overflow would soon be reached, and the higher it rose the more unnatural it became, the more contrary to human experience, the more baffling to the prudence of the prudent."

See also

American, etc., Co. v. *Talbot*, 141 Mo., 674; s. c., 42 S. W., 679 and 683.

Norris v. *Savannah, etc., Railroad Co.*, 11 Am. St. Rep., 355; 23 Fla., 182; s. c., 1 So., 475.

Smith v. *Western Railway*, 91 Ala., 455; s. c., 8 So., 754.

Long v. *Pennsylvania R. R. Co.*, 147 Pa. St., 343; s. c., 23 Atl., 459.

Gulf, etc., Railroad v. *Compton*, 38 S. W., 220.

International, etc., Railroad Co. v. *Bergman,* 64 S. W., 999.

Norfolk, etc., R. R. Co. v. *Marshall's Admr.,* 90 Va., 837; s. c., 20 S. E., 823.

Davis v. *Railroad Co.,* 66 Vt., 297; s. c., 29 Atl., 313.

When the Burlington road first declined to receive the shipment at Atchison and when, afterwards, a part of defendant's line between Topeka and Atchison became submerged and, therefore, impassable, defendant might have been held negligent if it had not used its other available line to Kansas City for the purpose of making delivery there to some connecting carrier.

See

Receivers of M., K. & T. Ry. Co. v. *Olive et al.,* 23 S. W., 625.

B. & O. R. R. v. *O'Donnell,* 32 N. E., 476.

The obligation to carry by a particular line or route is essentially a matter of contract. If a shipper gives specific instructions as to the route or the mode of carriage, and the carrier accepts the shipment without a specific agreement, he undertakes to carry in accordance with the instructions given. It is entirely a matter of agreement, as stated by Chief Justice Shaw in *Hastings* v. *Pepper,* 11 Pick. (Mass.), 41 and 43:

"As the carriage is a *matter of contract,* as the owner has a right to judge for himself, what position is best adapted to carrying goods of this description with safety, and to direct how they shall be carried, and as the carrier has a right to fix his own rate for the carriage or refuse altogether to take the goods, with such directions, the court are all of opinion, that if a car-

rier accepts goods for carriage, thus marked, he is bound to carry the goods in the manner and position required by notice."

So it was held in that case that if the carrier disregarded specific instructions of the shipper, the burden would be upon him to prove that the loss or damage was not attributable to the breach of contract, but was occasioned solely by the act of God, or a public enemy, or the act or fault of the owner himself.

See, also,

Post v. *Southern Ry. Co.*, 103 Tenn., 184; s. c., 52 S. W., 301.

A special contract, however, on the part of the carrier, different from that imposed by the common law, cannot be inferred from doubtful expressions or loose language, but only from clear or definite evidence.

Myrick v. *M. C. R. R. Co.*, 107 U. S., 102, 107.
Dixon v. *Columbus, etc., Ry.*, 4 Bissell, 137; s. c., vol. 7 Fed. Cases, p. 751, case No. 3929.

Under the written contract, the defendant, having two lines over which the cattle might be transported and delivered to a connecting carrier, in the route to destination, one terminating at Atchison and the other at Kansas City, it had the right to select such line of its own to fulfill its agreement as, under the circumstances during the transportation, appeared to it to be reasonably safe. Under the written contract in this case, as no route was agreed upon and specified therein, plaintiffs could not have been permitted to show that any special route was agreed upon, as that would be an attempt to add to the obligations of the con-

tract. Under the contract, each carrier had the right to select and forward over any line or route which appeared reasonably safe and expeditious.

White v. *Ashton*, 51 N. Y., 280, 284.

Hinckley v. *N. Y. C. & H. R. R.*, 56 N. Y., 429, 433, 434.

Snow et al. v. *Ind. R. R. Co.*, 109 Ind., 422; 9 N. E., 702.

C., I. & L. R. v. *Woodward*, 72 N. E., 558 (Supreme Court of Indiana, 1904).

Ind. R. R. v. *Remy*, 13 Ind., 518.

Patten v. *U. P. R. R.*, 29 Fed., 590.

Post v. *Southern Ry.*, 103 Tenn., 184; s. c., 52 S. W., 301.

Hutchinson on Carriers, 2nd Ed., sec. 126a.

Long v. *Railroad Co.*, 50 N. Y., 76.

Hudson Canal Co. v. *Coal Co.*, 8 Wallace, 276 288.

There was no wrongful deviation of the shipment, as claimed. Questions of wrongful deviation generally arose in cases of marine insurance. Such insurance was generally effected upon a cargo with reference to a known route or passage between the points designated, such route or passage being the one generally traveled by ships, and therefore considered safe. Under such contract of insurance, the insurance company had the right to claim that its liability did not attach if, without reasonable excuse, the carrier departed from a well known and usually safe course into a course known to be circuitous and likely to be more dangerous. A shipper when taking out marine insurance would have the same right to insist that if he lost or was

likely to lose the insurance by reason of a wrongful or unreasonable deviation by the carrier, the carrier should have known that such a result would follow from his breach of contract of transportation, and should, therefore, be held liable for the loss sustained. Where the shipper had effected no insurance, however, in view of any route, it would seem apparent that he would have to show that the damage claimed was one which the carrier ought to have anticipated or contemplated as likely to result if it broke its contract of carriage.

In *Hostetter* v. *Park*, 137 U. S., 30, it is said on page 40, citing a number of cases:

"A deviation is defined to be 'a *voluntary* departure, *without necessity* or *reasonable cause*, from the regular and usual course' of a voyage, in reference to the terms of a policy of marine insurance; but it is no deviation, in respect to such a voyage, to touch and stay at a port out of its course, if such departure is within the usage of the trade."

In *Constable* v. *The National Steamship Co.*, 154 U. S., 51, it was held that the landing of a cargo at a different pier than that owned or controlled by the steamship company and designated as its pier in its bill of lading was not a deviation so as to render the steamship company liable for a loss by fire at such other pier. The only reason given for taking the cargo to such other pier was that there was no room at the pier of the defendant steamship company. It was also held that libellants, having taken no steps on the faith of the cargo being unloaded at defendant's pier, were not prejudiced by the change. On page 66 it is said:

"It is claimed, however, that the berthing of this

ship at a pier other than her own was in legal effect a deviation which rendered the company an insurer of the cargo discharged at such pier without notice, until its actual delivery to the consignee. In the law maritime a deviation is defined as a '*voluntary* departure *without necessity,* or *any reasonable cause,* from the regular and usual course of the ship *insured.*"

In Ray's Negligence of Imposed Duties, Freight Carriers, p. 317, it is said:

"There is a class of cases in which an agent is justified, by an unexpected emergency, in deviating from his instructions where the safety of the property requires it. * * * But while a deviation cannot be made for the mere convenience of the carrier, without rendering it liable for the injury which may result; yet, such deviation from the instructions of the shipper may be made in the case of an unforeseen necessity and a necessary change of route or means of transportation is justifiable, as forwarding perishable freight by rail, where a storm prevents a boat from proceeding on its voyage."

In *International, etc., Railway Co.* v. *Wentworth,* 27 S. W., 680, a deviation from the stipulated route was held justifiable, on account of floods.

See, also,

Foster v. *G. W. Rly. Co.,* L. R. (1904), 2 Q. B. Div., 306.

Patrick v. *Ludlow,* 3 Johns. Cas., p. 10; s. c., 2 Am. Dec., 130.

Reade v. *Comm. Ins. Co.,* 3 Johns., 352; s. c., 3 Am. Dec., 495.

Regan v. *Grand Trunk Ry. Co.,* 61 N. H., 579.

In *The Propellor Niagara* v. *Cordes,* 21 Howard, p. 7, Mr. Justice Clifford, on pp. 24 and 25, said:

"A deviation from the direct route may be excusable if rendered necessary to execute repairs for the pres-

ervation of the ship, or the prosecution of the voyage, or to avoid a storm, or an enemy, or pirates. * * * As agent of the owner, the master is bound to carry the goods to their place of destination in his own ship, unless he is prevented from doing so by some cause arising from irresistible force over which he has no control and which cannot be guarded against by the watchful exertions of human skill and prudence. When the vessel is wrecked or otherwise disabled in the course of the voyage and cannot be repaired without too great delay and expense, he is at liberty to tranship the goods and send them forward so as to earn the whole freight; and if another vessel can be had in the same or a contiguous port, or at one within a reasonable distance, *it becomes his duty under such circumstances to procure it and transport the goods to their place of destination,* and in that event he is entitled to charge the goods with the increased freight arising from the hire of the vessel so procured."

See, also,

Phelps, James & Co. v. *Hill,* L. R. (1891), 1 Q. B. Div., 610 and 611.

5 Am. & Eng. Ency. of Law, 2nd Ed., 424 and 425.

In the authorities cited by our opponents there was either a departure from the express instructions of the shipper and without apparent necessity therefor, or the route taken was known to be more dangerous than the usual route and the emergency did not arise while the property was in transit.

It is well settled in the law of agency that where a deviation from instructions is due to necessity or an unforeseen emergency, not itself due to the agent's default, the agent, using his best judgment to carry out the objects of the agency, will not be held responsible,

although it should subsequently develop that another course would have been preferable. Acts done in a *bona fide* effort to save perishable property come within this rule. Where the instructions are obscure or ambiguous, an agent using his honest and diligent discretion in the interpretation of them, will not be held responsible if he makes a mistake.

1 Am. & Eng. Ency. of Law, 2nd Ed., 1063 and 1064.

Many of the authorities simply hold that where the carrier disregards the instructions of the shipper and thereby breaks his contract, he assumes the obligations of a common carrier, or the common law liability of such carriers, and he cannot claim the exemptions of the special contract.

See

4 Elliott on Railroads, Sec. 1515.

It must be remembered, however, that Frost, the president of the Empire Company asked the defendant to run around the flooded area. (Rec., 74.) Other agents of plaintiffs in charge of trains made no objections to the course pursued.

But at common law the carrier would be excused for damages caused by an act of God, as that is something which could not be reasonably expected or provided against.

The rule is well settled in *Morrison* v. *Davis,* 20 Pa. St., 171, on p. 175, which was cited and relied upon by this court in *Railroad Company* v. *Reeves,* 10 Wallace, 176, as follows:

"The general rule is, that a man is answerable for

the consequences of a fault only so far as the same are natural and proximate, and as may, on this account, be foreseen by ordinary forecast; and not for those which arise from a conjunction of his fault with other circumstances that are of an extraordinary nature."

Where the wrong complained of is merely an inadvertent or thoughtless omission of duty, or a mere negligent act without any wilful intent to inflict injury, the defendant in such case should only be held responsible for those results which might reasonably have been foreseen by a man of ordinary intelligence and prudence. In such case he could not be expected to anticipate that an extraordinary, unprecedented and unexpected calamity might intervene to cause a damage which might have been rendered thereby possible by reason of a condition or situation brought about without design to inflict injury on his part.

See

Missouri Pacific Ry. Co. v. *Columbia,* 65 Kans., 390; s. c., 69 Pac., 338.

Cleghorn et al. v. *Thompson et al.,* 62 Kans., 727; s. c., 64 Pac., 605.

1 Sutherland on Damages, 3rd Ed., Sec. 16.

1 Shear. & Red. on Negl., 4th Ed., Sec. 28, p. 28.

Fleming v. *Beck,* 48 Pa. St., 313.

Hoag v. *Rld. Co.,* 85 Pa. St., 293.

C., St. P., M. & O. Ry. Co. v. *Elliott,* 55 Fed., 949, and 952.

Glassey v. *Worcester Cons. St. Ry.,* 70 N. E., 199.

Stone v. *Boston & A. R. R. Co.,* 171 Mass., 536; s. c., 51 N. E., 1.

Schaffer v. *R. R. Co.,* 105 U. S., 249.

Under the undisputed evidence, the trial court correctly determined as a proposition of law that the delay to the shipment at Strong City, even if negligent, was not the proximate cause of the damage, but that such cause was the unprecedented and extraordinary flood, the extent of which could not have been anticipated and which amounted to an act of God.

The R. D. Bibber, 50 Fed., 841.

Goodlander Mill Co. v. *Standard Oil Co.,* 63 Fed., 400.

Southern Pacific Co. v. *Pool,* 160 U. S., 438 and 440, and cases heretofore cited.

Where but one inference can be reasonably drawn from the evidence, the question of negligence or no negligence is one of law for the court.

District of Columbia v. *Moulton,* 182 U. S., 576 and 579.

Elliott v. *C., M. & St. P. Ry. Co.,* 150 U. S., 245 and 246.

Randall v. *B. & O. R. R. Co.,* 109 U. S., 478 and 482.

Tuttle v. *Milwaukee Railway,* 122 U. S., 189.

Such question was necessarily submitted to the court by each side asking for a peremptory instruction in its favor.

The evidence failed to show any wrongful deviation of the shipment; on the contrary, it showed there was no deviation from the contract of carriage, and none from any instructions of the shipper which could be claimed to have been the cause of the damage. The transportation to the Kansas City Stock Yards was un-

der the circumstances rendered necessary and if the extraordinary flood had not occurred defendant would have been held liable in damages for not adopting such course.

The evidence wholly failed to show any intervening neglect on the part of the Railway Company after the cattle were overtaken by the flood in the Kansas City Stock Yards. There was no question to be submitted to the jury, for it clearly appeared under the evidence and the law that the defendant was not liable. It is not necessary to point out here in detail wherein many of the authorities cited by our opponents are in conflict with rules of law plainly laid down by this court. The judgment in favor of the defendant was right, and no occasion exists for issuing the extraordinary writ of *certiorari* to review the action of the lower courts upon the evidence.

Respectfully submitted,

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ROBERT DUNLAP,
Attorneys for Respondent.

A. B. BROWNE,
Of Counsel.

No. [redacted]178.

—IN THE—

United States Circuit Court of Appeals

EIGHTH CIRCUIT.

Office Supreme Court, U. S.
FILED.
DEC 26 1906
JAMES H. McKENNEY,
CLERK.

EMPIRE STATE CATTLE COMPANY, a Corporation, W. E. WAITE, E. F. WAITE, W. H. FROST, P. H. KELLOGG, C. L. MILLETT and J. D. CARR,
Plaintiffs in Error,
vs.
THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, *Defendant in Error.*
No. 2276.

THE MINNESOTA AND DAKOTA CATTLE COMPANY, *Plaintiff in Error,*
vs.
THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, *Defendant in Error.*
No. 2277.

Error to the Circuit Court for the District of Kansas.

Statements, Specifications of Errors, Briefs and Arguments for Plaintiffs in Error.

NOTE:—These two cases are alike, involve the same questions of law and fact, were tried together below, and by agreement are to be heard and submitted together here.

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Attorneys for Empire State Cattle Company, et al. in No. 2276.

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Attorney for the Minnesota and Dakota Cattle Company, in No. 2277.

FILED
OCT 21 1905

—IN THE—

United States Circuit Court of Appeals

EIGHTH CIRCUIT.

EMPIRE STATE CATTLE COMPANY, a Corporation, W. E. WAITE, E. F. WAITE, W. H. FROST, P. H. KELLOGG, C. L. MILLETT and J. D. CARR,
Plaintiffs in Error,
vs.
THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, *Defendant in Error.*

No. 2276.

Statement of the Case, Brief and Argument of Plaintiffs in Error,

Empire State Cattle Company, et al.

STATEMENT OF THE CASE.

This case, and the case immediately following it, namely, *The Minnesota and Dakota Cattle Company* v. *The Atchison, Topeka and Santa Fe Railway Company*, No. 2277, were and are companion cases. The two cases were brought at the same time in the lower court and were tried together by the court with the same jury. The

evidence which is set out in the Bill of Exceptions in this case was introduced in both cases, and the evidence and instructions given and refused, with all of the rulings thereon, were the same in the trial court in both cases, and the Bill of Exceptions in this case is identically the same, word for word, with the Bill of Exceptions in The Minnesota and Dakota Cattle Company case. The propositions of fact in the pleadings and arising on the evidence in each case involve the same questions of law and fact as the other. Separate Bills of Exceptions, exactly alike, were filed in the two cases and separate writs of error and citations were sued out and served, and complete transcripts in both cases were brought to this court, but it is the understanding and agreement in this court, as it was in the trial court, that the two cases are to be heard by this court and submitted together. It has been arranged that while there are separate statements and briefs, they will be printed in this one book under the same cover. While the counsel of The Minnesota and Dakota Cattle Company will make a separate statement, brief and argument, following this statement, brief and argument in this case, we have thought it best to make this statement at this point so that the court, in reading this statement, brief and argument in The Empire State Cattle Company case, may have in mind the identical propositions of fact and law in The Minnesota and Dakota Cattle Company case. About the only difference between the case of The Minnesota and Dakota Cattle Company case and this consists in the fact that while the cattle in both cases were shipped out from Texas about the same time, the cattle in The Minnesota and Dakota Cattle Company case were stopped for feed and water at Wellington, while the cattle in this, The Empire State Cattle Company case, were stopped for feed and water at Strong City.

With this preliminary statement of both cases, we will now proceed with the statement of this, The Empire State Cattle Company case.

This is an action at law, tried in the trial court by the court with a jury, and comes to this court by writ of error.

The suit was brought in the lower court by plaintiffs in error, as plaintiffs, against the defendant in error as defendant. The action was brought to recover damages for the negligence and wrong of the defendant respecting a shipment of cattle by plaintiffs over the defendant's railway.

The defense of the defendant was and is that the injury to plaintiffs' cattle while being shipped over defendant's railway was due to the flood at Kansas City in May, 1903, which is pleaded and relied upon by defendant as an act of God, and as an excuse for the injury to plaintiffs' cattle.

At the conclusion of all the evidence, the trial court gave a peremptory instruction to the jury to return a verdict for the defendant, and plaintiffs excepted at the time to the giving of this peremptory instruction, and the jury having rendered their verdict accordingly, and final judgment having been given by the court thereon in favor of defendant, the plaintiffs in due time filed their Bill of Exceptions containing all the evidence and their exceptions, and the case comes to this court by writ of error and citation. (Record, pages 1 and 2.)

The petition of the plaintiffs was filed in the lower court November 13th, 1903. (Record, pages 3 to 8.) The petition states that the plaintiff, Empire State Cattle Company, was and is a corporation, created and existing under the laws of South Dakota, with its principal offices in that state, and that said cattle company, and the other plaintiffs, were and are citizens and inhabitants of

said state of South Dakota; that the defendant railway company was and is a corporation, created under the laws of the state of Kansas, with its principal place of business at Topeka therein, and that the defendant railway company, in 1903, and at the other times mentioned in the petion, owned and operated as a common carrier a railway from Amirillo, Texas, to Atchison, Kansas, by way of Topeka, Kansas, and that as such defendant engaged as a railway company in the transportation for hire of passengers, freight and live stock over said railway.

The petition of the plaintiffs stated the following further facts: That on May 25th, 1903, plaintiffs were the owners of 798 head of cattle, at Hereford, Texas, and the plaintiffs shipped from said Hereford said 798 head of cattle for transportation, by rail, from that point to Evarts, South Dakota; that said shipment was made over three lines of railway, to-wit, from Hereford, Texas, to Amirillo, Texas, over the Pecos & Northern Texas Railway; from Amirillo, Texas, to Atchison, Kansas, over defendant company's railway, and from Atchison, Kansas, to Evarts, South Dakota, over such connecting line of railway as should receive said cattle from said defendant railway company. Said 798 head of cattle were delivered to defendant at said Amirillo, Texas, for shipment over defendant's railway to Atchison, Kansas, and to be there delivered by it to said connecting railway company, and said defendant on May 25th, 1903, accepted from plaintiffs said 798 head of cattle for shipment from said Amirillo, Texas, to said Atchison, Kansas, over its line of railway between those points; and said 798 head of cattle were transported by defendant as such common carrier from Amirillo, Texas, to Strong City, Kansas, which was and is a station on defendant's line of railway between Amirillo, Texas, and Atchison, Kansas, and at said Strong City, Kansas, on May 26th,

1903, said 798 head of cattle were by defendant unloaded to be fed and said 798 head of cattle having been fed at said Strong City, on the night of May 26th, 1903, the same were ready to be reloaded and for transportation and carriage thereof and to be continued on the morning of May 27th, 1903. At and prior to the morning of May 27th, 1903, and in consequence of the continuous rains which had prevailed over Colorado, Kansas, Nebraska, Iowa and Missouri, an unprecedented flood had commenced in the waters of the Kaw and Missouri rivers, extending from the source of the Kaw river to its mouth, and extending down the Missouri river to a point where said Kaw river empties into said Missouri river. That said 798 head of cattle were detained by said defendant at Strong City, Kansas, from the morning of said May 27th, 1903, to May 29th, 1903, and during the time of which detention, defendant twice loaded and unloaded from the cars in which they were being transported said cattle of plaintiffs. That during all of the time of said detention of said cattle at Strong City, Kansas, said flood in both said Kaw and Missouri rivers was daily and hourly becoming higher, as defendant's officers and agents well knew. That on said 29th day of May, 1903, defendant again reloaded said cattle at Strong City, Kansas, and instead of continuing their transportation to said Atchison, Kansas, by way of Topeka, Kansas, on its regular line, deviated on its, the defendant's own motion, the transportation of said cattle by carrying them to Kansas City, and that on the arrival of said cattle at Kansas City, on the morning of May 30th, 1903, defendant, instead of leaving said cattle on the uplands where they would have been safe from the continued rise of the said flood in said Kaw river, deposited said 798 head of cattle in pens along by the side of the said Kaw river and near the mouth thereof, and where, as defendant

and its officers and agents well knew, the waters of said flood in said Kaw river for several days had been continually rising, and at which point in said Kaw river, on said May 30th and 31st, 1903, said flood reached its climax, and extended far back from the ordinary channel of said Kaw river from each side thereof so as to fill and cover the said pens in which defendant so deposited said 798 head of cattle of plaintiffs.

It was further stated in said petition, that on May 31st, 1903, defendant, in order to save said catttle from being drowned, drove the said 798 head thereof into the viaducts extending over said pens and above the waters, which in consequence of said flood had submerged said pens, and that in so driving said cattle into said viaducts, defendant mixed and intermingled said 798 head with 2,200 head of other cattle that were in said pens at said time, and that said 798 head of cattle remained in said viaducts from said May 31st, 1903, to June 7th, 1903; that said waters, so made by said flood, extended from said May 31st to June 7th, back from said pens a distance of three-quarters of a mile and more, and were of a depth from eight to fifteen feet, and that in consequence of said waters, and of the placing of said cattle in said viaducts, it was impossible to feed or water said cattle during said period of seven days; that by reason of the location of said cattle and the mixing of the same with said 2,200 head, it was impossible for either defendant or plaintiffs to sufficiently feed or water said 798 head of cattle; that by reason of said insufficient feeding and watering of said 798 head of cattle 99 head thereof died; that all of said 798 head of cattle, both at the time of their shipment at Hereford, Texas, and at the time they were shipped from Strong City, Kansas, were in good condition, and were each worth the sum and price of $25.00, and that by the death of said 99 head of cattle

plaintiffs sustained a loss of $2,475; that by reason of the driving of said cattle in and on to said viaducts, 8 head thereof were fatally injured and crippled so as to render them totally valueless, whereby the plaintiffs lost the further sum of $200. That after deducting from said bunch of 798 head said 99 head, and said 8 crippled head of cattle, there remained 690 head, but that said 690 head were so injured and damaged by reason of the said insufficient feeding and watering of the same, as to cause a diminution in value of each said 690 head in the sum of $10 per head, so that plaintiffs lost on said 690 head the further sum of $6,900.

The petition of plaintiffs shows further damages, making the entire loss of plaintiffs in excess of $12,000.

The petition further avers that it was the duty of defendant as such railway company and common carrier to exercise due and reasonable care in the carriage and transportation of said cattle from Amirillo, Texas, to said Atchison, Kansas, but that defendant was guilty of negligence in the following particulars, to-wit:

1st. Defendant did not exercise due and reasonable care, but was negligent in the detention of said cattle at Strong City, Kansas, from May 27th, 1903, to May 29th, 1903, and in not carrying and transporting on May 27th, 1903, said cattle from said Strong City, Kansas, to Atchison, Kansas, by way of Topeka, Kansas, so that said cattle might have been by defendant, at said Atchison, Kansas, delivered to a continuing and connecting carrier at that point.

2nd. Defendant did not exercise due and reasonable care in the transportation and carriage of said cattle, but was negligent in not detaining said cattle at Strong City, Kansas, on said May 29th, 1903, until the said unprecedented flood in said Kaw river had subsided, so that

the transit of said cattle might be safely resumed without liability to damage or injury thereto.

3rd. Said defendant did not exercise due and reasonable care, but was negligent and acted wrongfully and without plaintiff's consent in the deviation of the shipment of said cattle by defendant to Kansas City, from which last point and city, defendant had and has no connecting line extending to Atchison, Kansas.

4th. Defendant did not exercise due and reasonable care in the transportation and carriage of said cattle by carelessly and negligently endeavoring to head off the flood of said Kaw river by landing and depositing said cattle in the pens on the bank of said Kaw river, at the mouth thereof several days after the rise and increase of the flood of said Kaw river, and plaintiffs say that defendant by its agents and servants in charge of the transportation of said cattle of plaintiffs had actual knowledge of said flood from said May 27th, 1903, and well knew of said flood, and of the continued rise and increase thereof on said May 30th, 1903, when said defendant so deposited said cattle of plaintiffs in said pens by the side of said Kaw river at the mouth thereof.

5th. That defendant having wrongfully transported said cattle to Kansas City as aforesaid, carelessly and negligently failed and neglected to move or cause to be moved the same from their position of peril aforesaid at Kansas City, Missouri, as it had reasonable time and opportunity to do, before the arrival at said Kansas City of said flood, but the same were overtaken by said flood.

The concluding averments of plaintiffs' petition were, that by reason of the foregoing facts plaintiffs had sustained damage in the sum of $15,000, for which sum, together with costs of this suit, plaintiffs prayed judgment. The foregoing constitutes the substance of plaintiffs' petition.

The answer of defendant, which was filed April 22nd, 1904, contains, first, a general denial of every allegation contained in plaintiffs' petition.

The second paragraph of defendant's answer professes to be a special plea or special statement of facts and circumstances attending this shipment and accompanying the answer was the shipping contracts, marked exhibits "A," "B" and "C," filed therewith, upon which the cattle of plaintiffs were shipped. Said paragraph of defendant's answer shows that said contracts were made with the Pecos & Northern Texas Railway Company, for transportation, as averred in plaintiffs' petition, by that company from Hereford, Texas, to Amirillo, Texas, and said answer admits that defendant received said cattle for shipment over its line of railway to be delivered by defendant to a connecting carrier for transportation and to be delivered at the point of destination, and that paragraph concludes with the plea that the injuries complained of to said cattle were caused by the flood of May 30th, 1903, and that said flood was in its nature unusual, extraordinary and unprecedented, and that the injuries were proximately caused by said flood as an act of God, and was not proximately caused by any negligent act or omission on the part of the defendant railway company in the transportation of said cattle. The concluding paragraph of defendant's answer pleads that plaintiffs wholly failed and neglected to give notice to defendant in writing of plaintiffs' claim for damages to said cattle to any officer of defendant company, as provided in the 8th paragraph of said shipping contract. The answer of the defendant and said shipping contracts may be found in the record from pages 9 to 19 thereof. To said answer plaintiffs filed a reply, denying each and every allegation, averment and matter of whatsoever kind in said answer contained. (Record, pp. 19 to 21.)

Plaintiffs in their reply by way of reply to the last paragraph of defendant's answer, respecting the subject of notice, stated, that on June 8th, 1903, and as said flood was subsiding at Kansas City, and while plaintiff's cattle were still in defendant's possession, and after both plaintiffs and defendant knew that a large number of plaintiffs' cattle had died by reason of the matters set up in plaintiffs' petition, and after plaintiffs and defendant both knew that the residue of plaintiffs' herd had been greatly damaged as mentioned in plaintiffs' petition, but before either plaintiffs or defendant knew the exact number of cattle that died, or either the exact or full extent of the injury to the residue of said herd, plaintiffs delivered to W. A. Combs, assistant general live stock agent of the defendant, at Kansas City, Missouri, a notice in writing, notifying defendant that plaintiffs would claim damages for injuries to said cattle mentioned in plaintiffs' petition, such damages resulting from negligence of the defendant, its officers, servants, agents and employees in the handling and shipping of said cattle.

It was further stated in said reply that thereupon defendant notified plaintiffs that the residue of said herd of cattle could not be safely transported to the point of their destination in South Dakota without being first pastured in some good pasture, so that said cattle could recuperate from their feeble condition, so as to be able to be transported to said destination; that thereafter and on June 10th, 1903, plaintiffs served on said defendant at said Kansas City, through said Combs, as such general assistant live stock agent, a notice and consent that defendant might temporarily, before continuing the shipment of said cattle to said destination, put said cattle, or the residue thereof, upon pasture, and consented that defendant might do so at the expense and risk of defendant, and that in giving such consent, all rights were re-

served to plaintiffs as they existed before said consent was given, that no right under the contract of shipment, and no right to damges either to said cattle, in detail, or otherwise, was waived. It was further stated in said reply that repeated demands were made at Kansas City by defendant through defendant's general attorneys, at said Kansas City, to plaintiffs, to consent to take said cattle from said defendant and relieve defendant from further shipment of said cattle, but that plaintiffs steadfastly declined so to do, and that on or about the first day of July, 1903, defendant took the remnant of said herd to its pastures at Emporia, Kansas, and kept said cattle on its pasture at Emporia, Kansas, until July 15th, 1903, when defendant resumed the transportation of said cattle over its line of railway to the point of destination in connection with the connecting carrier. That at the time defendant resumed the shipment of said cattle from defendant's pasture at Emporia, Kansas, defendant requested plaintiffs to give, and plaintiffs gave, defendant a certain obligation in writing, whereby plaintiffs bound themselves to pay to defendant certain charges which defendant claimed should be paid by plaintiffs if in any proper litigation in court it should be held that plaintiffs were liable to pay said charges for the keeping of said cattle in the stock yards in Kansas City, and in said pastures of defendant at Emporia, Kansas.

It was further stated in reply that, on July 25th, 1903, plaintiffs gave defendant an itemized list of damages claimed by plaintiffs as stated in the petition herein; that plaintiffs prior to said July 25th, 1903, were unable to give defendant said itemized list, but that during all of said period from June 1st, 1903, to July 25th, 1903, defendant had full knowledge of the injuries to plaintiffs' cattle complained of in the petition in this cause, and had frequent and continuous negotiations with plain-

tiffs with reference to said cattle and the damage and injury thereto, and the reply of plaintiffs' concluded with an averment that defendant waived the giving by plaintiffs to defendant of any other notice than those which were given as specified in said reply.

The case was tried by the trial court with a jury in January, 1905, the trial continuing for a period of nine days from January 16th, 1905, to January 25th, 1905 (pp. 21 to 28, Record.)

The bill of exceptions in the case extends from page 29 to page 656 of the printed record, and said bill of exceptions contains all the evidence offered by both parties at the trial (p. 637, Record). Said bill of exceptions also contains thirteen instructions which were prayed by plaintiffs to be given by the court to the jury, and the refusal of the court to give said thirteen instructions and plaintiffs' exceptions thereto (pp. 638 to 644, Record). Said bill of exceptions also contains the written opinion of the learned trial judge, given by him in sustaining defendant's motion for a peremptory instruction to the jury (pp. 645 to 655, Record).

The testimony at the trial below, and set out fully in the bill of exceptions, shows the following facts: A stipulation was read between the parties that said Empire State Cattle Company was, and is, a corporation, created under the laws of the state of South Dakota, and that said cattle company and said other plaintiffs were and are all residents of and citizens of the state of South Dakota, and that defendant was, and is, a corporation duly created and existing under the laws of the state of Kansas, and a resident of that state (Record, pp. 29 and 30).

We will first give in this statement a history of the rise and climax of the flood of May, 1903, and the knowledge of defendant of that flood at and prior to the reception by defendant for shipment of plaintiffs' cattle.

One of the plaintiffs' witnesses at the trial was Mr. Patrick Connor, of Kansas City, Missouri, who in 1903, and for some time prior thereto and since that time had charge of the United States Weather Bureau office at Kansas City, Missouri (p. 300, Record). Mr. Connor testified in substance as follows:

That the Republican and Smoky Hill, Saline, Solomon and Big Blue rivers all empty into the Kaw river, and that said other rivers drain practically the north half of Kansas, and also the southern part consisting of the two lower tiers of counties of Nebraska, and also a small portion of Colorado. That the rainfall which in the aggregate brought the flood of 1903 of the Kaw river and at Kansas City, Missouri, commenced to fall and start in April, 1903; that any rains that saturated the ground would tend to diminish the capacity of the ground to hold moisture, but the chief rains which brought on that flood fell in the month of May. That the rains which fell in the first half of May, 1903, were quite heavy. A tabulated report made by the witness of the rainfall during a portion of the month of May was given in evidence and may be found at page 300 of the record. Mr. Connor testified that the average fall of rain during the first fifteen days of May was much heavier than usual. That the rainfall during the month of May was unusually heavy and that it averaged from two and a half to three inches in the western part, eight to ten inches in the eastern part, in excess of the normal amount that falls during the month of May. That the rains through the month of May, 1903, were quite general throughout the month; that there may have been a cessation of rains about the 15th to the 18th. That there was not much diminution of rain except the first few days in the month of May, probably two or three days, or three or four days, and then a slight cessation around the middle of the

month; that otherwise the rains were continuous, according to the best of his recollection; that the rainfall at nights was the same as in the day times. Said statement furnished by Mr. Connor also shows the stages of the water each morning in May, 1903, at the foot of the Hannibal bridge in Kansas City, which bridge is the one used by the C., B. & Q. Railroad Company. Mr. Connor further testified that during the last eleven days of May, 1903, the enormous quantity of nearly seven inches of rain fell in the central and eastern thirds of Kansas, not scattered downpours, but general rains during that period; that the normal rainfall at Kansas City during May of each year is little more than four and one-half ($4\frac{1}{2}$) inches (page 320, Record). Mr. Connor also furnished a table of the rainfall during May, 1903, at Manhattan, Kansas, on the Kaw river, and his table shows that the total rainfall at that place in May, 1903, was 9.6 inches (pages 317 and 322, Record). That on Tuesday, May 26th, 1903, witness commenced to issue warnings of the rise of the flood, and with these warnings were made between four and five hundred maps, which were sent out daily from his office about 10 o'clock each morning, and that those maps were furnished to large business institutions, and a number of them were mailed within the limits of Kansas City, Missouri, and Kansas City, Kansas, and that the remainder were sent outside of Western Missouri, and over the state of Kansas pretty generally; that nearly all of the business institutions of any consequence had been on the map list of the United States Weather Bureau at Kansas City for years which received maps of this kind, and that the Kansas City Stock Yards Company was one of those cases. The warnings so given by the witness during the flood of 1903 were identified by him and introduced in evidence, and may be found from page 301 to page 303 of the record.

Respecting these warnings Mr. Connor testified it was the wish of his office to give just exactly to the public the cause or causes leading up to the flood and the augmentation or diminution each day, and the consequences are always referred to, the character of the water which obtained over that territory whenever mentioning the flood question as to whether or not rains had occurred and whether or not they were light or heavy. In substance the witness stated in these reports that owing to the tremendous quantity of water which had fallen it would necessarily raise or cause a flood at Kansas City.

Respecting a question asked Mr. Connor how long it would take water at a certain height in the Kaw river at Topeka to obtain the same height at Kansas City, Missouri, Mr. Connor answered, it would not take very long, and that the crest of the flood moved at the rate of two miles and six-tenths per hour in the Kaw river. The distance from Topeka to Kansas City is about sixty miles, and according to this testimony it would take about twenty-four hours for the flood at Topeka to reach the same height at Kansas City.

Mr. Connor further testified that taking into consideration the differences in the height of the valley of the Kaw between Topeka and Kansas City, it would take about thirty hours in the case of a great flood for the flood at Topeka to reach Kansas City.

Mr. Connor further testified that the flood in the Kaw river of 1881 attained a stage of 26 and .2 feet above zero. He further testified that there was practically no flood condition north of St. Joseph in the Missouri river in 1903; that there was not much damage from flood between St. Joseph and Atchison, Kansas; that the flood between Atchison, Kansas, and St. Joseph, Missouri, was moderate; that from Leavenworth south the flood in the Missouri river was more severe. He also

testified of the flood of the year 1904, and that the flood of the latter year was nine or ten feet below the height of the flood of 1903 (Record, 320).

Another witness in the case was T. B. Jennings, who has charge of the United States Weather Bureau of the state of Kansas, with office at Topeka, Kansas. Mr. Jennings has held that position since 1886. His testimony may be found at page 219 of the record.

Mr. Jennings testified that the rainfall for the first twenty days of May, 1903, averaged about four inches, or possibly a little over four inches, through the territory east of Norton and Trego counties, north of Smoky Hill river; then from the 21st to the 28th of May, 1903, it averaged another four inches, and on the 28th of May came the tremendous rainfall, which was about five inches and a quarter at Salina and was evidently considerable more, because that washed out the rain gauge in Abilene and the river was already bank full when this water came. That "we got a month's rainfall during the first twenty days of May, we got an average May rainfall, then during the next seven days that was repeated and on the 28th we had the tremendous downpour in the central counties extending from Saline county northeastward into Marshall. About the normal amount of rain for the month of May fell during the first twenty days.

The territory I have in mind in what I have stated above as to rainfalls during the month of May, is the territory east of Norton and Trego counties and north of the Smoky Hill and Kaw rivers; it is the Kaw river watershed. The Smoky Hill passes through Trego and the Solomon and the forks of the Republican cut through this way, and it is the counties east of that portion of the state. The rainfall that I have described is in the Kaw river watershed; I am giving the rainfall that fell in the territory that flows its waters into the Kaw river

finally; the Kaw draws from ten miles south of the Platte river in Nebraska; draws all the water to ten miles south of the Kaw in Kansas; in other words, the Kaw river watershed is all on the north side of the river. The most of the rainfall the latter part of May occurred on the 28th; there was but little rainfall west of Manhattan after that; we had a rain Sunday, the 31st; it rained up to Sunday here, Sunday the 31st.

We received a request from the Kansas City stock yards on the 29th and 30th to wire them the conditions every three hours; all we could do was to wire them the rise of the river from one period to another because there was no gauge here. The main streams that flow into the Kaw above Topeka are the Blue river, which comes in at Manhattan, the Republican river, which comes in at Junction City, and the Salina and the Solomon; the Solomon comes in at Solomon City; the other streams are mainly creeks; the Smoky Hill and Kaw rivers are one and the same stream; that is they commence calling it Kaw river after the Republican joins the Smoky Hill at Junction City; the Saline and Solomon rivers rise in the western counties of Kansas, Trego and Sheridan counties; the Republican rises in the eastern part of Colorado and the northwestern part of Kansas; the Blue rises up in Nebraska, in the neighborhood of Lincoln, that is it covers quite a block of counties south of Lincoln, Nebraska."

Another witness for the plaintiffs was W. E. King (Record, 223), assistant city engineer, of Topeka, Kansas. Mr. King testified that the rains in the month of May, 1903, were exceptionally heavy; "we had considable work here in the city, and were laid out by the continuous rains. I took the first observation in the rise of the Kaw river at Topeka on the morning of May 28th, at 8:30 o'clock; the Kaw river was then 6.0′ above city

datum; that is a base from which we establish to make calculations; it is an imaginary base that is 10.8′ above low water mark; low water mark is the stage of the river at ordinary times. When I say that the water was 6.08′ above city datum, that means 16 feet and .88 or eleven inches above low water mark on the morning of the 28th at 8:30. The Kaw river continued to rise after that. I kept men stationed at that point until the crest of the flood; I have a thirty minutes continuous report from May 28th at 8:30 to June 6th at 10:30. The crest of the flood was reached at 9 p. m. May 30th; between 8:30 the morning of the 28th and 9 p. m. of May 30th the water rose ten feet and one-tenth."

Another witness for the plaintiffs was Theron S. Cafferty (225, Record), of Topeka, Kansas, and who was roadmaster of the defendant since 1887. Mr. Cafferty testified that he remembered the flood of 1903, in the Kaw river, and when the defendant's railroad from Topeka to Atchison became impassable on account of said flood. He testified that it became impassable on May 29th, 1903; that the last train that went from Topeka to Atchison left Topeka May 29th at 6 a. m., and that that train got as far as Valley Falls, which is a station between Topeka and Atchison, and that witness saw the condition of things there was so bad that he sent this train to Leavenworth and that he came back to Topeka on a hand car; that that train which left Topeka on the morning of May 29th was the last train from Topeka to Atchison until the flood subsided. That the tie-up of all passenger trains, freight trains and stock trains for Atchison at Topeka began on the 29th; that there was no obstruction on that line prior to the 29th from Topeka to Atchison."

Another witness for plaintiffs was W. A. Dyal (290, Record), of Topeka, Kansas. Mr. Dyal testified that

he was in Topeka, Kansas, in May and June, 1903, and remembered the flood. That he was in the scrap iron and metal business at 214-216 North Kansas avenue; that his place of business was five hundred feet from the Kaw river on the south side. "I could not get to our place of business on May 30th. I know the rainfall along the Kaw river at Topeka, and in Kansas, during the month of May, 1903, was very heavy; it began to be heavy along about the 15th of May, I should judge; I should say that the rain continued from the 15th of May on heavy; the river kept rising, the rains after the 15th must have been pretty heavy up the Kaw judging from the way the river came up; the river began to rise at Topeka along about the 15th, possibly as late as the 20th of May; I should say the grade floor of our building was in the neighborhood of 18 or 20 feet above the Kaw river at low water mark; the water reached our grade floor the night of the 29th of May; the height of the water on the 20th of May was high, I couldn't say how high; if I remember right the water did not fall much after it commenced rising; we were preparing to get away, and the river kept up so I staid at home on account of it. I should say it commenced to get high between the 15th and 20th; the flood got four feet higher than our grade floor. It reached that height of four feet above our grade floor I suppose about the 30th, we could not get down there after I left there the night of the 29th about 10 or 11 o'clock, and it was just commencing to get in our grade floor, then the morning of the 30th I could not get there."

Another witness for the plaintiffs was C. T. McLellan (Record, 292), of Topeka, Kansas, who was and is division superintendent of the defendant railway company. His division as such superintendent included the defendant's railway from Argentine to Emporia, by way

of Topeka, and from Holliday to Emporia and by way of Topeka to Atchison and St. Joseph and Wilder to Hawthorne by way of Leavenworth and Alma branch, Burlingame to Alma.

Mr. McLellan testified he remembered the flood of 1903, and that we had frequent rains and some of them heavy in the month of May, 1903; that about the 27th or 28th of May he got reports from the Rock Island office in Topeka by 'phone as to the conditions of the water in the vicinity of Manhattan; that on the 27th of May witness was at Lakeview, on defendant's line of railway, between Lawrence and Topeka, and that these telephone communications to Topeka from Manhattan by way of the Rock Island were telegraphed to witness at Lakeview by his chief clerk in his office at Topeka; that at that time he was protecting the right of way between Lakeview and Lawrence where the river was high; that in consequence of the rains and the flood, the last time the trains passed over defendant's road between Topeka and Lawrence was on the morning of May 29th, 1903, about 4:30 and 5:30 in the morning; that was the last wheel that moved on the track between Topeka and Lawrence during that flood period. No other trains passed over that line until the 8th of June. "A stock train leaving Strong City and coming to Kansas City over that line could not have come over our road by way of Topeka after 5 o'clock Friday morning, May 29th. I was attending personally to the work, looking after flood conditions on the different points of our road between Topeka and Kansas City and I was getting reports from every point on the division where we were threatened. The Kaw river at Topeka, I think, commenced to rise early in May, but the rise was very gradual and slow. I think by the 14th or 15th, middle of the month, the flood was rising slowly; there was not a steady rise,

there was times when it was at a standstill and fell slowly. The rains during the period were very nearly continuous. I tried to keep fully informed from time to time of the state of the weather at Topeka. The track between Lang and Emporia was flooded on the 30th and a portion of the 31st of May. Our trains discontinued running between Topeka and Emporia the morning of May 30th. Lang is on our main line between Emporia and Topeka about eight miles east of Emporia." Being asked up to what time the trains continued to run from Strong City to Emporia and Topeka up to Atchison, the witness answered, "we discontinued train service to Atchison on the morning of the 29th, that the last train that went through was a freight, which left Topeka about 3 o'clock in the morning and reached Atchison about 8 o'clock the same morning. In consequence of the floods, the running of trains was discontinued after the morning of the 29th between Topeka and Atchison, between Topeka and Leavenworth and between Topeka and Kansas City; trains between all those points on our road were discontinued on the morning of the 29th; the running of trains on our road from Wilder to Leavenworth were also discontinued; all of the lines of the Santa Fe system in Kansas, north of the Kaw river, were discontinued on the morning of May 29th; we were still open and operating trains between Holliday and Kansas City. Our lines from Topeka to Atchison became flooded at Valley Falls. The Delaware river, which is one of the tributaries of the Kaw, overflowed the main line at Valley Falls; the Delaware river empties into the Kaw river opposite Lecompton, sixteen miles east of Topeka. The track of our railroad at Topeka was flooded and the track became impassable at noon on the 29th. There was a break across the Kaw river on our road, in the direction of Atchison, at Topeka, and at noon on the

29th I was informed by the office force of our company that they had not been able to put anything over the Kaw at Topeka after train 122, which left Topeka at 3 a. m. that morning. The water was over our road at Holliday all day on the 29th; there is a sag in the track of our road at that point, the roadbed is low and the bank of the river is low. The last train over our road at Holliday was a stock train and went over our road at that point about 10:15 or 10:30 the night of May 29th, east bound; that train came to Holliday by way of the Ottawa cut-off from Emporia to Holliday. After the morning of May 29th there was no trains came east by way of Holliday except by that cut-off."

The witness further testified that the business of the defendant railway company is and during its entire existence has been that of a common carrier engaged in the carrying of passengers and freight for hire.

He further testified that the office of the general superintendent, train master, and of the witness as division superintendent, C. W. Cook as assistant general freight agent, and W. J. Hurley, both at the time of the giving of witness' testimony and in the year 1903, were and had been at Topeka, and that these gentlemen in May and June, 1903, had their offices in the Atchison, Topeka & Santa Fe Building, opposite the capitol in Topeka, Kansas.

Another witness in the case, who testified as a witness for the defendant, was H. W. Sharp (Record, 593), of Kansas City, Missouri, who was general superintendent of terminals of defendant at Kansas City. He testified that Mr. J. E. Hurley, the general superintendent of the defendant railway company, with offices at Topeka, was with witness on Saturday, May 30th, and the night following; that superintendent Hurley went with witness to Argentine, which is a suburb of Kansas

City, about 10 o'clock Saturday morning, May 30th, 1903; that Mr. Hurley and witness started from the Santa Fe freight house at the corner of Hickory and Joy streets, in Kansas City, Missouri, to go to Argentine, on the top of a box car, so that they might see the extent of the water as much as possible; that superintendent Hurley and witness went to Argentine at that time to size up the situation and see the extent of the water and figure on the probable and possible further rise; that they rode on top of the car to get a better and plainer view of the surroundings.

Witness Sharp further testified that Mr. Hurley was in communication with the Santa Fe Topeka offices during Saturday in regard to the flood situation; that the witness saw the telegrams which passed between Superintendent Hurley and the Topeka office in regard to the flood; that witness talked personally with Superintendent Hurley about the flood situation; that the meeting of witness and Superintendent Hurley on Saturday was for the purpose of discussion of the flood situation. "Some parts of our railroad between Topeka and Kansas City were under water at that time. Superintendent Hurley and I staid at Argentine that morning some time, we left Kansas City about 10 o'clock and got back about 12:30 o'clock; the condition at Argentine while we were there was pretty hard; there was about four inches of water over the rail of the main line, just west of the Rex Mills; there was about the same amount of water there was at Argentine. Rex Mills is between Argentine and Kansas City; there was no water at that time at Kansas City on our tracks. Superintendent Hurley and I thought from the information which we had that the crest of the flood had about reached Argentine, and we figured that even in the lowest part of the yard, we believed if we got as much as two feet more, that the contents of the cars would not be damaged; Argentine was our storage yards

and unloading yards for all business passing through Kansas City. Our yards at Kansas City and Argentine both had something over fourteen hundred loads and sixteen hundred empties; most of them were at Argentine. We estimated at 12:30 Saturday, May 30th, that we could stand a further rise of two feet or two and a half feet without injury to the property in our yards."

The witness further testified that along in the evening of the same day, probably along from 6 to 7 o'clock, he first obtained information from Argentine yards as to the dangerous condition of the flood there. Witness says in this connection, the water seemed to be rising right along, still rising slowly and it continued to rise slowly all the evening, until 8 or 9 o'clock in the evening the water was getting up pretty well.

Witness further testified that about 4 o'clock in the afternoon of May 30th they commenced moving out of their yards at Argentine their engines and coaches to the south end of the Kansas City yard right along north of the mule barns of Sparks Brothers. "The place to which we moved those engines and cars from Argentine was the highest land in the Kaw valley available for moving cars and engines."

Said J. E. Hurley, the general superintendent of defendant, was also a witness in the case (Record, 172). Mr. Hurley testified (Record, 196) that the last train between Topeka, Kansas, and Atchison before the high water was train No. 122, which left Topeka at 3 o'clock a. m. May 29th; the track between Strong City and Emporia was not disabled.

There was other testimony in the case in relation to the flood and its continuation during said month of May, 1903, and the knowledge by the defendant, its officers and agents, but we will not [illegible] the statement thereof any further here, but the same will appear incidentally

from the other facts brought out in the testimony and referred to hereafter.

Respecting the first specification of negligence in the plaintiffs' petition, that the defendant did not exercise due and reasonable care, but was negligent in the detention of the cattle at Strong City from May 27th, 1903, to May 29th, 1903, in not carrying and transporting said cattle on May 27th from Strong City to Atchison by way of Topeka so that said cattle might have been by defendant at said Atchison delivered to the continuing and connecting carrier, the testimony was as follows:

One witness for the plaintiffs was W. H. Frost (Record, 37). Mr. Frost was one of the plaintiffs and accompanied the shipment of cattle mentioned in plaintiffs' petition from Hereford, Texas, to Kansas City. Said Frost represented the plaintiffs as owners of said cattle and had a man with him looking after the shipment of the cattle by the name of Albert Newton. Mr. Frost testified that he bought this train load of cattle about one hundred miles south of Hereford, Texas; that there was 798 head in the train; that these cattle were loaded at Hereford, about 9:30 p. m., May 25th, 1903; that the train carrying these 798 head of cattle consisted of 21 cars. That the train carying said cattle was taken over the line of the Pecos Valley railroad from Hereford to Amirillo; that said train reached Amirillo about 11 o'clock in the evening of May 25th; that after remaining at Amirillo about an hour the cars containing said cattle were taken over the line of the Atchison, Topeka & Santa Fe railroad to Strong City, and there unloaded; that said train reached Strong City about 11 o'clock in the evening of Tuesday, May 26th; that said cattle were unloaded at Strong City by a crew in the stock yards of the defendant at that place; that the said cattle were fed and watered the morning of May 27th about 8 or 9

o'clock, and that said cattle could have been loaded out from Strong City at 11 o'clock a. m. on Wednesday, May 27th.

Witness further testified that nothing was done with the cattle at Strong City until the evening of the 27th, when they were reloaded out for transportation; that the train containing the said cars was pulled down on the sidetrack and set on the track awhile and then ordered back; that they were loaded about 4 o'clock that evening and remained on the side track about an hour and then the train was backed up and the cattle unloaded again in the yard. That witness was not consulted at any of the times when the cattle were unloaded or reloaded and unloaded again; that said cattle were reunloaded the second time about 7 o'clock Wednesday evening, May 27th; the cattle were then put back in the yards.

Witness further testified that the cattle were reunloaded again the next day in the forenoon, but that the entire train was not loaded up at that time; that witness thinks that about half of the cattle were loaded up at that time; that they consumed perhaps half an hour in loading up at that time; then the cattle were again put back into the yards. "I was not consulted in the unloading or loading up again by anybody." The cattle were again loaded up on Friday morning of the 29th of May, 1903, about half past 7 o'clock, or 8 o'clock. The cars containing the cattle were loaded and run down on the side track, where they remained about three hours, then they were pulled out about one or half past one that day to go to Emporia.

Thus it will be seen by the testimony of Mr. Frost, one of the plaintiffs in the case, that plaintiffs' cattle were detained at Strong City from Wednesday until Friday. Mr. Frost testified, as we have seen on page 39 of the record, that the cattle had finished being fed and

watered and were ready for transportation to be resumed at 11 o'clock on Wednesday, May 27th, 1903; he testified that the cattle were still held at Strong City until one or half past one of Friday, May 29th (Record, 41), when they pulled out to go to Emporia. This testimony shows therefore, that the cattle were detained two whole days at Strong City, Kansas, and the contention of the plaintiffs is that the defendant company had ample time during that two days by continuing the transit of the cattle to have shipped them out so as to have delivered them to the connecting line at Atchison, and that if that had been done, the cattle would have reached their destination at Evarts, South Dakota, without injury or damage from the flood.

In this connection we desire to call the attention of the court to the testimony of two witnsses, one G. W. Cloyd (Record, 31). Mr. Cloyd's testimony shows that Mr. Frost, whose testimony we have just referred to, at the time he, Frost, bought the train load of 21 cars containing the 798 head of cattle in controversy in this case, bought as a part of the same transaction, another bunch of cattle, which filled up another train load consisting of twenty cars, and the witness Cloyd was in charge of this other train load. As already stated, the two train loads were bought together at the same time by Mr. Frost as parts of one transaction and to make up one entire shipment, but the shipment was divided into two train loads. The train load in controversy was in charge of Mr. Frost, accompanied by Newton, while the other train load was in charge of the witness Cloyd, with one Keiser. The train load in charge of the witness Cloyd left Hereford about 5:30 in the afternoon of May 25th, while as we have seen the train load in charge of Mr. Frost left Hereford about 9 o'clock or 9:30 o'clock the same evening. It is thus seen that the two trains in leaving Here-

ford, Texas, were about four hours apart. Witness Cloyd says that his train load came over the Pecos Valley to Amirillo, which was reached about 8 o'clock the same evening; that they remained at Amirillo about forty-five minutes and that they went from Amirillo with his train to Strong City over the defendant Atchison, Topeka & Santa Fe Ry. Mr. Cloyd further testifies that his train reached Strong City about 5:30 p. m. on the evening of Tuesday, 26th of May, and in this connection it will be remembered that Frost testified that his train reached Strong City about 11 o'clock the same day, and thus it is seen that the two train loads were about the same distance, three and a half or four hours, apart on reaching Strong City that the trains were apart when they left Hereford. The witness Cloyd (Record, 32) further testified that his train remained at Strong City until the evening of Wednesday, 27th, about 8:30. By comparing the testimony of Mr. Frost with that of Mr. Cloyd, it will be seen that the two train loads were at Strong City all day on Wednesday the 27th. Witness Cloyd further testified (Record, 35) that his train, which left Strong City at 8:30 p. m., Wednesday evening, May 27th, went through to its destination at Evarts, South Dakota; that his train was not caught in the flood anywhere. The other witness referred to was J. D. Carr, and one of the plaintiffs in this action (Record, 116). Mr. Carr testified that the first train load of cattle, which was the train load accompanied by the witness Cloyd, and to which we have referred above, was seen by the witness Carr in Sioux City, where he met that train; that he met Cloyd's train on the last Sunday in May (May 31), and that he (Carr) accompanied the shipment of that first train load from Sioux City to Evarts, South Dakota, where that train load arrived uninjured on Monday, June 1st, 1903; that in that shipment there was 763 head of cattle of the

same ages and the same kind of cattle as the cattle in the train accompanied by Mr. Frost, which is the train load in controversy.

It is thus seen from the testimony of Messrs. Frost, Cloyd and Carr that if the train load of 798 head of cattle in controversy in this case had been continued in its transit by the defendant from Strong City, the same as the transit of the other train load in charge of Cloyd was continued from Strong City, by defendant, the train load of cattle in controversy in this case would have reached its destination uninjured and that the death and injury of the cattle by the flood would have been avoided. Cloyd's testimony shows that his train was detained twelve hours or more by reports of high water and then continued from Strong City.

There is no evidence in the record controverting the foregoing facts proven by the testimony of Messrs. Frost, Cloyd and Carr; there is and can be no denial or question on the part of the defendant that if the train load of cattle in controversy had been shipped out from Strong City by the defendant, as the other train load was shipped out, the injury to these cattle would have been avoided. The contention of the plaintiffs is that in view of the shipment out of the train load in charge of Cloyd, the detention of the train load of cattle in controversy at Strong City during the two days they were there was negligence on the part of the defendant and that that negligence either caused or contributed to produce the loss sued for in this action.

The next charge in the petition to which we desire to invite the court's attention, in the statement of facts, is the second charge that defendant did not exercise due and reasonable care in the transportation and carriage of said cattle, but was negligent in not detaining said cattle at Strong City, Kansas, on said May 29th, 1903, until

the said unprecedented flood in said Kaw river had subsided so that the transit of said cattle might be safely resumed without liability to damage or injury thereto.

The contention of the defendant in the trial court was, and the same contention will doubtless be renewed here, that the defendant was not negligent in detaining plaintiffs' cattle at Strong City said two days, said detention having been caused, as it contends, by the flood which as we have already seen was prevailing throughout the watershed of the Kaw river.

In this connection, referring back to the testimony of Messrs. King, Cafferty, Dyal and McLellan, the substance of whose testimony we have already given above, it will be remembered that all of the lines of railway of the defendant which afforded any possible outlet to the train of cattle in controversy were flooded on the morning of Friday, May 29th, 1903. The uncontradicted testimony of Messrs. Frost and other witnesses is that the train load of cattle in controversy did not leave Strong City until Friday noon (Record, 41). The witness Newton also testified (Record, 135) that he accompanied Frost on the train in controversy, and testifies to the same effect that the train load in controversy were reloaded on Friday, the 29th, and run out on the track until about half past one, and that they remained there about two hours and a half, and both Frost and Newton testified that during the two days that the train in controversy was detained at Strong City the railway agent of the defendant at Strong City informed them that the detention was on account of high water along the line of the defendant's railway; and since it is claimed by the defendant that the detention of plaintiffs' train load of cattle in controversy at Strong City for the two days they were held there was in consequence of the flood and high water, and since the uncontradicted evidence of King, Cafferty,

Dyal and McLellan shows that defendant's several lines of railway from Emporia north going both to Kansas City and Atchison were flooded early on the morning of Friday, May 29th, plaintiffs contend that the shipment of the cattle in controversy from Strong City at noon of Friday, the 29th, with a view of encountering the flood in the Kaw river and which flood covered all the lines of railway of defendant, was negligence on the part of defendant.

This contention is emphasized by the consideration of the various telegrams between the general offices of the defendant respecting the transit of the train load of cattle in controversy. Those telegrams are eighty in number and may be found from page 178 to 194 of the record. Those telegrams are classified according to the dates, beginning with the telegrams sent on Tuesday, May 26th, 1903, and continuing down to the last telegram, which was sent on May 30th, 1903. It will be observed by an examination of all of those telegrams that they related solely to the situation of the flood as it affected this shipment of cattle. Three of those telegrams were sent as early as May 26th. An examination of those several telegrams sent from the 26th until the 30th of May will show that the movements of this train in controversy all emanated from the general offices, and under the direction of the general superintendent, Mr. Hurley, and other general officers of the defendant at Topeka, Kansas, and those telegrams show that the situation in regard to the movements of the train in controversy were so exceptional as to call forth from the first arrival of the cattle at Strong City the interposition of the general officers of the defendant company. Twenty-four of those telegrams were sent on Wednesday, the 27th, and when read together show that the defendant, from Tuesday, the 26th, by its general officers at Topeka,

were acquainted with the flood conditions in the Kaw river and along the lines of their railway, and that two days before Friday, the 29th, when this train load was shipped from Strong City, conditions were such as to make it extremely hazardous, dangerous and negligent to move those cattle from Strong City until the flood. which the defendant knew on Wednesday, the 27th, was on, had fully subsided. Thirty-five of those telegrams passed to and from between the general officers of the defendant respecting the flood conditions as affecting the shipment of the cattle in controversy on Thursday, May 28th, 1903, and those telegrams, taken as a whole, show the extreme dangerous situation as it existed on Thursday, May 28th, and that condition was known to the general officers of the defendant railway company. The same observation is true of ten or more of the telegrams which passed to and from the officers of the defendant on Friday, May 29th. These telegrams, taken in connection with the other evidence to which we have referred, make it conclusive, as it seems to us, that defendant in not detaining plaintiffs' cattle at Strong City until the flood had entirely subsided was negligent, and that but for such negligence plaintiffs' cattle would not have been damaged as complained of in plaintiffs' petition.

We will next present the evidence which supports the 3rd specification in plaintiffs' petition, that said defendant did not exercise due and reasonable care, but was negligent and acted wrongfully and wtihout plaintiffs' consent in the deviation of the shipment of said cattle by defendant to Kansas City, from which last point said defendant had and has no connecting line extending to Atchison, Kansas. It will be observed in this third specication two propositions of fact are stated, one that the deviation of the shipment of plaintiffs' cattle to Kansas City was wrongful and the other that such deviation was

negligent. It will be conceded that if that deviation was negligent, defendant was liable to plaintiffs for the injury which ensued, and it will not probably be denied that if independently of the question of negligence the deviation without plaintiffs' consent of the shipment was *per se* wrongful, then defendant is also liable.

Upon the question whether the deviation was wrongful, we call the courts attention, first, to that part of the record which shows that the cattle in controversy were to go from Amarillo, Texas, to Atchison, Kansas, by way of Topeka, and to be there delivered to the C. B. &. Q. railroad for shipment to Council Bluffs, and shipped from there to Evarts, South Dakota, by way of the Chicago, Milwaukee and St. Paul railway, and that the route thus designed, did not contemplate a shipment of cattle under any circumstances to Kansas City.

On this branch of the case we call attention first to the contracts for shipment appended to defendant's answer as exhibits. Copies of those contracts of shipment, will be found between the blank page 12 and page 19 of the record. On the back of each one of the contracts is the following

"Live stock contract, Hereford, Tex.
To Atchison, Kansas,
May 25th, 1903."

This endorsement is on the back of each one of the contracts and the testimony of the witness Newton, who accompanied the plaintiff Frost with these cattle, is to the effect that he saw these contracts at the time the shipment commenced and that the contracts indicated that the cattle were to ge by way of Atchison (Record, 158 to 160). The bills of lading for the train load in controversy, were offered in evidence by plaintiffs, and a copy of one of those bills of lading may be found at page 121 and 122 of the record. The bills of lading

show that the cattle in controversy, were shipped from Hereford, Texas, destined to Evarts, South Dakota, on May 25th, 1903, and that they were routed to go by way of the junction to Amarillo and thence with the Atchison, Topeka & Santa Fe Railroad company and over that line to Atchison, where they were to be taken by the Kansas City, St. Joseph & Council Bluffs railroad which is a part of the Burlington system to Council Bluffs and from thence by the way of the Chicago, Milwaukee & St. Paul, to Evarts, South Dakota. This is the line over which the cattle were routed to go by the bills of lading made by defendant and the bills of lading are in harmony with the endorsements on the back of the contracts which routed the cattle to go by way of Atchison. On this point Mr. Hurley, the general superintendent of defendant company (Record, 173) testified that cattle shipped over its railway from Amarillo, Texas, to go north would pass both Strong City and Emporia, by way of Atchison; that the feeding points on defendant's railway north from Amarillo, Texas, were Wellington, and Strong City, Kansas, and at page 174 Mr. Hurley distinctly testifies that the usual and customary route from Strong City to Atchison, is across the Kaw river at Topeka and that trains pass north from Strong City to Atchison through Osage City, Burlingame, Topeka, Valley Falls and Nortonville to Atchison, Kansas, and that that is the customary route for all trains of live stock, dead freight, passenger, and everything between Amirillo, Texas, to Atchison, Kansas, and was the customary route in 1903. (See also testimony of Mr. Hurley Record, 176).

In that connection on that page, Mr. Hurley also testified that the deviation of the train of cattle, in controversy, in this case, from the customary and usual route by way of Topeka to Atchison, from Emporia to Kan-

sas City, was made by his, Mr. Hurley's order, and the testimony of Mr. Hurley (Record, 195) shows that he, Superintendent Hurley, in making his several orders or telegrams and otherwise directing the movements of plaintiffs' cattle in controversy, and taking them to Kansas City, acted without any communication between him, Hurley, and anybody representing the plaintiffs, and the testimony of both Mr. Frost and Mr. Newton, shows that neither of those persons were consulted in any way by any representative of the defendant company in the movement of the train of cars in controversy. All of the movements of the train of cars in controversy, whether consisting of the loading or unloading of the cattle, or the reloading, or the reunloading, or the movements or detentions, or the deviation to Kansas City, were by the defendant through its general officers, without any consultation or communication with Mr. Frost or any other persons representing the plaintiffs. The testimony of Mr. Frost on this point will be found (Record, 41) and the testimony of Mr. Newton on this point (Record, 156 and 157). There is no testimony in the record contradicting the testimony of Mr. Frost and Mr. Newton, that the defendant's officers did not consult with Mr. Frost or other representative of the plaintiffs in connection with the movement of this train. Upon the proposition that it was within the contemplation of these parties that the cattle were to be shipped from Amirillo to Atchison, by way of Topeka, the learned trial court in its opinion in this case (Record, 653) recognized the route to Atchison as within the route originally contemplated by the parties, and the learned Judge, in his argument on that branch of the case treats the line that was originally in the contemplation of the parties as the line from Strong City to Emporia, thence by way of Topeka to Atchison.

The facts bearing upon the question of negligence of defendant company in deviating the shipment to Kansas

City, are as follows: There is no evidence in the case that the yards of the defendant company at Strong City, Kansas, where plaintiffs' cattle were detained for two days, was an insufficient place at which to hold the cattle until the flood had subsided. And it must be taken as conceded, there was no necessity, in the situation of the cattle at Strong City, which required their removal from that point, and if there was any danger from a flood at Strong City, the defendant company could have escaped that danger by the removal of the cattle to pastures of defendant twenty or thirty miles distant, which were situated near Emporia, Kansas, where the plaintiffs' cattle were taken by the defendant company after the injury and damage to the cattle was inflicted. And it will not be seriously contended by the railway company, that there was any necessity for removing the cattle from Strong City; they had been safely kept at Strong City for two days and could have been as safely kept there for ten or fifteen days longer until the flood had subsided. (See testimony of Superintendent Hurley, Pages 210-211, Record.) At the time of the removal of plaintiffs' cattle fram Strong City, Friday noon, May 29th the flood was on in the Kaw river at Topeka, all of the lines of the defendant company were flooded and the evidence shows that the cattle of plaintiffs were taken to Kansas City, not over any of the defendant's lines, but over the line of the St. Louis & San Francisco Railway Company by Olathe on a roundabout line of transit. The evidence of Messrs. Jennings, King, Cafferty, Dyal and McLellan, to which we have referred repeatedly, in this statement, show that from May 1st, to May 28th, eight inches of water had fallen in the Kaw river water shed, and that on May 28th, there was the tremenduous downpour of five inches, and other testimony shows, that on Friday, May 29th, in consequence of the said downpour of May

28th, there was a tidal wave in the Kaw river at Topeka, of about nine feet. This was the situation when the defendant deviated the shipment of plaintiffs' cattle from Emporia to Kansas City. The defendant by that deviation made the effort to outrun the flood in its descent down the Kaw river from Topeka to Kansas City. Defendant company, and its agents and officers, well knew of the tidal wave at Topeka, and the evidence of Mr. Connor, and the other witnesses, show that that tidal wave which reached Topeka on Friday the 29th, was bound to reach Kansas City within twenty-four or thirty hours thereafter. Thus the uncontradicted evidence shows that the defendant by the deviation, drew and carried the cattle of the plaintiffs into certain danger and destruction by attempting to cross the Kaw river at Kansas City, when everybody knew that the crossing at Topeka was an impossibility, and that within a few hours at best, it would be likewise impossible to cross at Kansas City. The contention of the defendant is, that defendant deviated the shipment to Kansas City, because it had an arrangement with the Missouri Pacific Railway Company, to take the cattle from the defendant company at Kansas City and carry them to Omaha or Council Bluffs, where their transit could be continued to the point of destination. The defendant claims that it had been informed by some of the telegrams, to which we have referred, that the Burlington railroad company, over whose line from Atchison to Council Bluffs the transit of the cattle was originally designed, could not carry the cattle from Atchison, because of the flood conditions above that point, but the Missouri Pacific Railroad from Atchison, to Omaha runs up the same valley that the Burlington runs from Atchison to Council Bluffs. As a matter of fact however, the evidence shows that the defendant company did not have any arrangement with the Missouri Pacific Railroad

company at the time the defendant deviated the shipment of plaintiffs' cattle from Emporia to Kansas City to carry these cattle from Kansas City to Omaha or Council Bluffs. This is shown by the evidence of the witness Douthitt (Record, 267). Mr. Douthitt was the live stock agent of the Missouri Pacific Railway company at Kansas City, and as shown by his testimony any arrangement respecting the transit of these cattle from Kansas City to Omaha by the Missouri Pacific Railway company, would have to be made through him as such live stock agent. Mr. Douthitt, is positive and emphatic that no arrangement was made between the defendant company and the Missouri Pacific Railway company for the transfer of these cattle by the defendant company to the said Missouri Pacific Railway company at Kansas City, for their continued transportation north, and that no arrangement whatever was made for the reception by the Missouri Pacific Railway company of the cattle at Kansas City. The only arrangement made with Mr. Douthitt and the Missouri Pacific Railway company, which he represented, was for the reception of these cattle by the Missouri Pacific Railway company at Atchison. In this connection we invite attention to page 268 where a telegram is copied from C. W. Cook, the agent of the defendant at Topeka, to Witness Douthitt, at Kansas City, and which telegram reads as follows: "Account of washout with Burlington want to deliver Missouri Pacific at Atchison about three trains of cattle for Evarts, S. D. and routed via Council Bluffs, care of C. M. & St. P. Presume you will join accepting north of Atchison same division Burlington accept. Rush answer."

This telegram was sent on May 27th, and on the same day as it appears from page 269 Mr. Douthitt sent back to Mr. Cook at Topeka, the following telegram: (Page 269 Record):

"Yours dated Q 2:52; will move the three trains cattle, Atchison to Omaha accepting division allowed Burlington which I understood is $13 per car; advise when shipment will be delivered our line. N. Douthitt."

We think the evidence of Mr. Douthitt taken in connection with the telegrams printed in the record will show that the defendant's general officers and agents who manipulated the movements of these cattle in this case lost their heads and became so nervous and excited as to be incapable of transacting business at or about the time of the deviation of plaintiffs' cattle from Emporia to Kansas City.

The facts to which we have called the court's attention in this statement in support of the third proposition of the plaintiff's petition that there was a negligent as well as a wrongful deviation of the shipment to Kansas City, support the fourth specification of negligence in plaintiff's petition.

The fifth specification in plaintiffs' petition is as follows: Defendant having wrongfully transported said cattle to Kansas City as aforesaid, carelessly and negligently failed and neglected to move or cause to be moved the same from their position of peril aforesaid, at Kansas City, Missouri, as defendant had reasonable time and opportunity to do before the arrival at said Kansas City of said flood, but the same were overtaken by said flood. This specification is supported by the following evidence at the trial of said cause. Among the witnesses in the case was a Mr. William M. Kendrick. (Record, 283). Mr. Kendrick was the live stock agent at Kansas City of the C. B. & Q. Railroad Company. This was the railroad company which was to take the cattle of the plaintiffs as they were originally routed from Atchison to Council Bluffs: Mr. Kendrick testified that on the arrival of these cattle Saturday morning, May 30th, he took steps to have

them hauled out over the Burlington railroad from Kansas City north to Council Bluffs, but he learned in some way that it was the desire of the defendant company to ship out by the Missouri Pacific Railway company. As will be seen by the testimony of Mr. Douthitt and other witnesses, the defendant company, learned early in the day of Saturday May 30th, that the Missouri Pacific Railway Company would not endeavor to take the cattle over its road, and the testimony of Mr. Kendrick, live stock agent of the Burlington, (Record, 287-288) shows that the Burlington railroad, on that day had plenty of engines and cars with which to haul out these cattle from Kansas City north over the Burlington railroad to Council Bluffs. The testimony of Mr. Kendrick also shows that on Saturday evening May 30th, 35 cars were shipped out of Kansas City on the Burlington. The testimony of Mr. Kendrick on this point is as follows:

Q. Did you send any cattle trains out by the Burlington Saturday?

By Mr. Angevine: Objected to by the defendant as incompetent, irrelevant and immaterial.

By the Court: Objection sustained; plaintiffs then and there duly excepted.

Q. Do you know of any trains going out in the part of the yards where these cattle were and clearing the flood on Saturday?

By Mr. Angevine: Objected to by defendant as incompetent, irrelevant and immaterial.

By the Court: Objection overruled, defendant duly excepting.

A. I don't know just where those cattle were yarded, we loaded out cattle there on Saturday evening.

By Mr. Angevine: Defendant objects to the answer as not responsive to the question; sustained.

Q. If they were yarded in what is known as the shipping division?

By Mr. Angevine: Objected to by the defendant; the witness says he don't know.

By the Court: Overruled, defendant duly excepting.

A. We loaded out I think it was two trains if I remember correctly, I think 35 cars Saturday evening.

Q. What time did they go out? A. I don't know exactly, I think between five and six o'clock.

Q. Where were they destined?

By Mr. Angevine: Objected to by defendant as incompetent, irrelevant and immaterial.

By the Court: Objection sustained; plaintiffs then and there duly excepting.

Q. Did they clear the flood?

By Mr. Angevine: Objected to by defendant as incompetent, irrevelant and immaterial.

By the Court: Objection sustained, plaintiffs then and there duly excepting.

Q. What road did they go on? A. Burlington.

Q. Which direction? A. East.

Q. When were they loaded? A. Saturday evening.

Q. What time were they loaded? A. Possibly, I think they left the yard between five and six o'clock.

Q. What time were they loaded? A. About that time, pulled them out as soon as they were loaded.

This evidence was elicited by the plaintiffs for the purpose of showing that the cattle of the plaintiffs in controversy in this case could have been shipped out by defendant Saturday May 30th, 1903, as bearing upon the question of negligence specified in the said 5th paragraph of the plaintiffs' petition recited above. In this connection we invite the attention of the court in its perusal of the evidence in this case to repeated rulings of the trial court sustaining objections to the admission of evidence offered by plaintiffs. The learned trial court did not seem to look with favor on plaintiffs' case

throughout. (The court's remark at page 172 Record, is a sample). However, under the rulings of this court cited hereafter in our brief, we ask that the court in considering the evidence in this case will consider that which was rejected by the trial court as well as that which was admitted. As bearing upon the proposition that the defendant after the arrival of the flood at Kansas City, could still have saved plaintiffs cattle from loss by driving them out of the stock yards, and that defendant was negligent in that respect, we refer to the testimony of W. C. Sparks, page 345 Record. The witness Sparks, was a member of the firm of Sparks Brothers engaged in the mule business at Kansas City, and the yard where that firm kept their mules was at 17th and Genessee streets, and within a block of the shipping division of the stock yards where the plaintiff's cattle were contained in the Kansas City Stock Yords after they were deposited therein. The evidence shows that plaintiffs' cattle arrived in Kansas City on the morning of Saturday, May 30, 1903, and were at once unloaded into the Kansas City Stock Yards, and the testimony of Mr. Sparks shows that between six and seven hundred head of mules in the said yards and barns of Sparks Brothers, within a block of where plaintiffs' cattle were lodged in the stock yards, were driven out of the said yards and barns of Sparks Brothers on Sunday morning May 31st, between 8 and 11 o'clock on that day, and said six or seven hundred head of mules were driven out of the yards six miles south of Kansas City in the country. This testimony proves that if the defendant company had exercised ordinary care, it could have driven the plaintiffs' cattle out of the stock yards up out of the Kaw valley on the uplands where said mules were driven by said firm of Sparks Brothers.

Another witness for the plaintiffs was L. A. Allen

(Record, 226). On page 238 of the record Mr. Allen testified as follows:

Q. Got them out to a place of safety? A. They could all have been driven out or taken out or shipped out in a few hours, all day Saturday.

Mr. Allen was and is a member of a live stock commission firm at Kansas City, Missouri, and was present during the flood of May 1903. Mr. Allen was recalled as a witness (Record, 622) and testified as follows:

Q. State whether or not there was any available way to get these cattle out of the yard on Saturday night and Sunday? A. Yes, sir.

Q. Now state how and in what way that could have been done, what means were available for the purpose? A. They could have been driven out in the country any time during that time.

Q. How long would it have taken to have gotten them from the shipping pens where they were to the highlands? A. 20 or 30 minutes.

Referring to what available means there were to move the cattle out the following testimony was given:

Q. What were they? A. Men and horses.

Q. How many? A. About the yards about 300 horses and three or four hundred men there all of the time; some commission men, some salesmen, some cattle drovers, speculators and traders.

Q. Did they have horses and men which were available for moving cattle? A. There were two stables there which hired horses.

Q. About how many men and horses would have been reasonably sufficient to drive those cattle and handle them through the streets and out to the highlands. A. Eight or ten men.

Q. Could they have handled the cattle so as to prevent their scattering and going all over the city? A. Yes, sir.

As to the extent of the loss and damage and injury to the plaintiffs' cattle by being driven upon the viaducts, the evidence fully sustains the averments in the petition. The cattle were driven up on the viaducts on Sunday May 31st, and in consequence of the inability of anybody to give them water and feed the plaintiffs sustained the injuries by the death and injury to the residue as specified in the petition. The 2200 head mentioned in the petition as having been mixed along with the plaintiffs' cattle as they were driven up on the viaducts, were the cattle of the Minnesota & Dakota Cattle Company which are the subject of controversy in the companion case to this between said Minnesota & Dakota Cattle Company and this defendant. The circumstances attending the driving of these cattle up into the viaducts may be found from the testimony of W. H. Frost, (Record, 37, 123, 298). Albert Newton (Record, 130); L. A. Allen (Record, 226), and Charles Stube (Record, 384). The uncontradicted evidence in the case shows that defendant after depositing said cattle of plaintiffs, without the consent of plaintiffs, in the Kansas City stock yards, on Saturday morning, May 30th, gave them no further attention or care. The defendant seems to have adopted the theory, that the defendant company when it delivered the cattle to the Kansas City stock yards, owed no further duty to plaintiffs respecting said cattle or respecting their care in any way. The evidence of H. P. Child, (Record, 529) and J. W. S. Hutchins, (Record, 542) was introduced by the defendant for the purpose of showing that where a shipment of cattle is made to pass through Kansas City and the cattle thus shipped are delivered by the railway company bringing them to the Kansas City stock yards, where another company is to take the cattle from Kansas City, the delivering company is under no further obligations after delivering

the cattle to the Kansas City stock yards. The contention of the plaintiffs in the trial below and here, was and is that that evidence is not applicable to this case, for the reason that it was not within the contemplation of the parties to this suit that the cattle in controversy were to be shipped to Kansas City or that they were under any circumstances to be delivered to the Kansas City stock yards. The evidence shows that the defendant did not intend to give and did not give as already stated any attention to plaintiffs' cattle after they were deposited in the Kansas City stock yards.

Mr. G. A. Roberts (Record, 522-523) who was the local live stock agent of the defendant company at Kansas City on cross examination by plaintiffs' counsel, testified as follows:

Q. Why didn't you people get that train out of here? A. I don't know.

Q. You knew about the other three trains coming in Friday morning about 6:30 didn't you? A No, sir.

Q. Saturday morning I mean? A. I suppose I knew it in a general way, yes, sir.

Q. Why didn't you get them out? A. I might say we did not get them out because it was not our business to get them out; we had hauled them in and it was up to the connecting line to get them out.

As we have seen there was no connecting line in this case, whose business it was, in the way the shipment was made to receive the cattle from the defendant company at Kansas City; the routing of the cattle did not contemplate that they were to be brought to Kansas City by the defendant company or hauled from Kansas City by defendant or any other company, much less was there any evidence to show that it was the design of the parties in the routing that the connecting company in the

transit were to take the cattle from the defendant company at Kansas City.

The reason, therefore, given by the witness Roberts, that the defendant company gave the cattle no further attention after they were deposited in the stock yards, because the defendant company had hauled them in and "it was up to the connecting line to get them out", is wholly insufficient as a reason in this case for the reason that there was no connecting line, and that the defendant's duty could not and did not end until it delivered the cattle safely to the connecting carrier at Atchison, Kansas. A delivery at Atchison, Kansas, is the only delivery by the defendant that satisfied the contract in this case. As a matter of fact, however, the defendant recognized itself as still in possession of the cattle from and after the flood. This is shown by the way bills read in evidence (Record, 121). A reference to the way bill there which accompanied these cattle from Hereford, Texas, to Evarts, South Dakota, shows the following endorsement on the bill of lading: "Reloaded July 10th, 1903, Lang, Kansas." This endorsement on the way bill was made under the following circumstances; the defendant company after the flood had subsided, and the cattle in controversy had been taken down again into the stock yards, reloaded the plaintiffs' cattle and took them out to its pastures near Lang, Kansas, the next station to Emporia, Kansas, and on July 10th, the cattle having been revived sufficiently by their pasturage there to be reshipped were reloaded by the defendant and hauled from Emporia and Lang, Kansas, by way of Topeka to Atchison, and there delivered to the Burlington as the connecting carrier and taken on through to Evarts, South Dakota . The use of this original way bill made at Hereford, Texas, to accompany the shipment through by the defendant

company in reloading and taking the cattle after the flood, shows that the defendant regarded its duty as to carrying the cattle through as still existing after the flood, notwithstanding the previous delivery by the defendant company of the cattle to the Kansas City stock yards company which latter company held the cattle as defendant's bailee. As further bearing on this point, the evidence shows that the defendant company paid the charges of the Kansas City Stock Yards Company when the defendant received the cattle back from that company and when the cattle were shipped from Lang, Kansas, as already stated, by the defendant company, to go through to destination at Evarts, South Dakota, the defendant company exacted from the plaintiffs, and the plaintiffs gave the defendant a bond (Record, 127-128). This bond is a distinct recognition by the defendant company that the defendant company had had possession of plaintiffs' cattle before, during and after the flood and the purpose of that bond was to secure the defendant company in the charges paid by the defendant company for the cattle while in the Kansas City stock yards, and the charges of defendant company for pasturage at Emporia and Lang, Kansas, if, in the course of the litigation, which it was understood would follow, the plaintiffs should be held liable for those charges. And as further bearing on this point, we call attention to the deposition (Record, 422) of Gardiner Lathrop, who was then, the general attorney of the defendant for Missouri, and is now the honored general solicitor of the defendant company for all of its lines. After the flood at Kansas City, and after the cattle of the plaintiffs were taken down from the viaducts into the stock yards, there were interviews between Mr. Combs, the general live stock agent of the defendant and Mr. Lathrop, its attorney, and the attorneys of the plaintiffs in this case, and of the Minne-

sota & Dakota Cattle Company, in the other case. At one of these interviews, Mr. Lathrop, speaking for the defendant company, desired plaintiffs in these actions to take the cattle off of the hands of the defendant company, so as to relieve the defendant from the duty and burden of the further shipment of the cattle to their point of destination in South Dakota. On this point Mr. Lathrop (Record, 423) testified as follows: "I remember this that we had wanted that the plaintiffs in this case should take the cattle off of our hands and take charge of them and ship them to destination and take care of them until ready to ship and that offer was declined."

As further supporting the proposition of fact that the defendant gave no attention to the plaintiffs' cattle after the deposit of the cattle by defendant in the Kansas City stock yards, we refer to the evidence of Mr. A. W. Combs (Record, 580). Mr. Combs was the assistant general live stock agent of the defendant company at Kansas City, and testified as a witness for the defendant in this case. Mr. Combs testified as follows:

Q. It has been suggested in evidence or in questions of counsel that you might have removed those cattle from the stock yards here, why didn't you do it? A. Why it never entered into the heads of anybody in the stock yards I don't think to move any stock out of the stock yards, we never thought of such a thing and there never was any such a suggestion made by anybody, and did not deem it necessary; I talked with the stock yards foreman, Mr. Hutchings, Saturday evening
* * *

Q. Was there any other reason why you did not attempt to move the cattle in question? A. We supposed that we had the cattle delivered to the stock yards company and other carriers, connecting carriers.

Q. You may state whether or not from your experience there and the custom of the yards, you considered what had been done as a delivery of the cattle? A. Yes, sir, we did everything that is customary to do in

delivering cattle to the connecting carrier, it was done in the same usual manner that it is the custom always to do, we delivered those cattle to the stock yards company for the connecting carrier and those which were to go through without feeding we delivered to the Missouri Pacific." As we have already seen the defendant in this case was not excused from looking after the cattle and removing them from the stock yards after the cattle were deposited by defendant in the stock yards on the ground of a connecting carrier, because there was no connecting carrier in this case to receive the cattle from the defendant company in Kansas City, and for the further reason that the defendant during and ever since the flood has recognized as we have seen, in various ways, the defendant company as always being in possession of plaintiffs' cattle until they were delivered by the defendant to the connecting carrier, at Atchison, and finally shipped out to their destination at Evarts, South Dakota, inclusive of the time the cattle were in the stock yards. The contention of the defendant below was and is here, that it did not owe any duty to plaintiffs' cattle after they were delivered into the stock yards. It is not denied by the defendant, if it owed the duty to plaintiffs to care for plaintiffs' cattle after they were delivered into the stock yards, the same as if defendant had never delivered them to the said stock yards, that defendant did not perform that duty; in short, it is not denied by defendant that it did not care for plaintiffs' cattle after they were delivered into the stock yards, if defendant owed said cattle any duty while they were therein. The issue tendered by defendant on this branch of the case is, that having delivered the cattle into the stock yards, the defendant no longer owed any duty in respect thereto. The defendant does not deny that it did not perform its duty, if it owed a duty. As we have seen, the cattle as a matter of fact, as between plaintiffs and defendant, were still in defend-

ant's possession, notwithstanding the delivery of the cattle into the stock yards, because their delivery by defendant in the stock yards was without plaintiffs' consent, and because there was no connecting carrier at Kansas City in the case, and because all the uncontradicted evidence in the case shows that the defendant treated itself as being in possession of said cattle while in the stock yards and during and after the flood and until their delivery to the connecting carrier at Atchison in their final transit after the flood.

What was true as we have seen of Roberts and Combs, with respect to their neglect of plaintiffs' cattle, after they were deposited in the stock yards, is also true of the witness Sharp (Record, 593) who, as we have seen was the general superintendent of defendant of terminals at Kansas City, and also of General Superintendent Hurley. As the foregoing statement shows, Messrs. Sharp and Hurley, although giving close attention on Saturday, May 30th, to the removal of freight cars and dead freight therein, and to the removal thereof from Argentine to Kansas City, gave no attention whatever to plaintiffs' cattle after they were deposited that Saturday morning in stock yards. The telegrams in evidence show that Mr. Hurley had been giving the closest attention to plaintiffs' cattle up to that Saturday, but the evidence of Mr. Sharp and the other evidence, shows that neither Mr. Sharp nor Mr. Hurley gave any attention to plaintiffs' cattle after they were shipped from Emporia to Kansas City. The cattle of plaintiffs in this action and the 2200 head of cattle involved in the other case, of the Minnesota & Dakota Cattle Company which were mixed together and taken up at the same time on the viaducts were worth in the aggregate from seventy-five to one hundred thousand dollars, and yet the uncontradicted evidence and facts in the

case show that neither Mr. Hurley nor Mr. Sharp gave the slightest attention to those cattle from the time they were deposited in the stock yards Saturday morning. There was considerable evidence at the trial offered and introduced by the defendant to show that the houses and stocks of goods, packing houses and other buildings and properties in the Kaw valley at Kansas City, were not removed before the climax of the flood. The testimony given for the defendant by the witness William Fletcher (Record, 552) and H. S. Swingley (Record, 564) was introduced by the defendant on this point. Of course, it was not shown and could not be shown that either the houses or stocks of goods at Kansas City in the valley of the Kaw, were placed at their locations therein after the rise of the flood of May 1903. Those houses and stocks of goods had been at the places where they were submerged by the flood for months and years prior to that flood. It was not shown, and could not be shown that the houses or stocks of goods could have been removed after the flood had reached the height it had reached, when the cattle in controversy were brought to the Kaw valley and were deposited in the stock yards. In this connection we call attention to the fact that the defendant's evidence shows that there was practically no live stock in the Kaw valley at Kansas City, Saturday, May 30th, 1903, or thereafter aside from the cattle involved in these two cases. The evidence shows that all of the cattle that were in the Kansas City stock yards at the time the cattle in these two cases were driven on to the viaducts, aside from these cattle were about 300 head. The cattle which were driven up on the viaducts was the 800 head in this case, the 2300 head in the case of the Minnesota & Dakota Cattle Company and about 300 head of other cattle making 3400 head altogether. Although the daily receipts in the Kansas City stock yards

of cattle are well known to run up into the thousands and tens of thousands, there is no evidence to show that there were any other cattle in those stock yards at the time these cattle were driven up on the viaducts except the two bunches in these two cases and said other 300 head. All of the cattle that were in the stock yards were driven up in the viaducts and the evidence shows that all the cattle that were driven up on the viaducts were these two bunches in these cases and the other 300 head. So far as the evidence shows there was not a single head of cattle in the packing houses in Kansas City when the climax of the flood came. The Sparks Brothers, as we have seen got out all of their mules, and everything that had legs with which to walk was gotten out of the Kaw valley, at Kansas City, except the cattle in these two cases and said other 300 head. A large amount of testimony introduced by the defendant and covering very many pages of this record showing that the houses and stocks of goods in the Kaw valley at Kansas City were not removed, is mere lumber in the case, and has no tendency to show what was the defendant's duty respecting the live stock in this case, which as we have seen was worth from seventy-five to one hundred thousand dollars, and which the defendant with its eyes wide open, brought to the very mouth of the Kaw river at the most dangerous point in the flood, and on the eve of its greatest height, and at the very time of its climax.

The averments in the pleadings in this action of the giving of notices by the plaintiffs to defendant of the loss and damage, were amply proven by evidence (Record, 111 to 116) and all of the averments of the petition and reply of the plaintiffs were amply proven at the trial by uncontradicted evidence contained in the bill of exceptions.

There are other facts shown in the evidence, but we will refer to them in our brief and argument.

SPECIFICATIONS OF ERRORS.

1. The trial court erred in refusing to give at the conclusion of all of the testimony the instruction and charge tendered and requested on behalf of plaintiffs, that under all of the evidence the jury should find that the defendant was liable, and to find for plaintiffs (Record, 637).

The court should have given this instruction on the ground of the wrongful deviation of the cattle without plaintiffs' consent, and for the reason that such deviation as a matter of law made the defendant liable for the consequence which ensued therefrom.

2. The Court erred after the refusal of said peremptory instruction, in refusing to give and charge the jury at plaintiffs' request instructions numbered from 1 to 13 inclusive (Record, 638-644). These instructions asked by the plaintiffs and refused by the trial court presented the issues of this case to the jury upon the question of negligence, and the court erred by their refusal.

3. The court erred in sustaining the motion and request of the defendant railway company to direct, and in directing the jury to render a verdict for the defendant and against the plaintiffs. (P. 644.)

4. The court erred in its opinion shown in the record, in saying:

> "It therefore follows on the main case, the "request for instructions to the jury to render a "verdict for the defendant must be sustained and "the like request of the plaintiff must be denied: "this will be done." (P. 655.)

POINTS AND AUTHORITIES.

I.

In this case, as the record shows, there were some exceptions by the plaintiffs in error to the rulings of the trial court in the exclusion of evidence offered by them and objected to by the defendant. We do not desire at this point in the brief to discuss those rulings. The trial court having ruled that upon all the evidence the plaintiff had no case, we submit at this time that the evidence which was excluded should be considered by this court with the evidence which was received . The plaintiffs in error in these cases are entitled in the consideration by this court of these appeals, to have all of the evidence in the record considered, the evidence offered by plaintiffs in error and excluded by the court, as well as the evidence that was received. *Ry. Co.* v. *Harris,* 12 C. C. A., 598, l. c. 602. In that case, which was decided by this court, it was adjudged that the rule is well settled that when a plaintiff offers and is ready to produce competent evidence to prove a material fact in issue, and the court rejects the evidence on the objection of the defendant, the defendant will not aftrwards be permitted to allege that the plaintiff failed to prove the facts alleged in the offer of evidence.

II.

The consideration of this cause involves in general two questions: (1) Whether the railway company is liable on account of the deviation of the shipment from Strong City to Kansas City; and (2) whether the railway company is liable on account of the several negligences charged and proven. The question of deviation raises a question of law pure and simple upon conceded facts. The question of negligences involves mixed ques-

tions of law and fact for determination by a jury under proper instructions from the court. To meet these two phases of the case, arising on the points of deviation and negligence, the plaintiffs in error asked two sets of instructions, one a peremptory instruction asking the court to instruct the jury to return a verdict for the plaintiffs, based upon the proposition of deviation, and at the same time plaintiffs submitted to the court a series of instructions submitting the issues to the jury on the propositions of negligence. It is the undoubted rule of this court that where both parties in a trial by a jury ask, on the whole case, the court to give a peremptory instruction to the jury, they are both precluded thereby, and both parties in such cases stand in the same predicament as if they had asked the court to decide the case as a matter of law. A different rule, however, arises in this case because the plaintiffs in error submitted, as they had the right to do, two sets of instructions at the same time, one asking the court to peremptorily rule the case in favor of plaintiffs on the proposition of deviation, and the other instructions asking the court in effect that if the peremptory instruction should be denied, to then submit the case to the jury on the proposition of negligence, for their determination. Of course, it will not be denied that plaintiffs had the right to insist upon the liability of the defendant on each of both propositions of deviation and negligence, and the plaintiffs therefore cannot be held to have waived its right by asking a peremptory instruction to a submission to the jury of the question of negligence, in the event that the court should deny their peremptory instruction, and we submit that plaintiffs in error have the right to maintain both propositions in this court.

III.

Unless the court felt required to give our peremptory instruction on the basis of deviation, it should have submitted the question of negligence to the jury by proper instructions, such as we asked (page 638, Record). That the court should have submitted the question of negligence to the jury and that that question was a proper question for the jury is the settled law of the Federal appellate courts. *R. R. Co.* v. *Stout*, 17 Wallace, 657, l. c., 663. In that case the United States Supreme Court, in its opinion, used the following language: "It is true, in many cases, that where the facts are undisputed the effect of them is for the judgment of the court, and not for the decision of the jury. This is true in that class of cases where the existence of such facts come in question rather than where deductions or inferences are to be made from the facts. If a deed be given in evidence, a contract proven, or its breach testified to, the existence of such deed, contract, or breach, there being nothing in derogation of the evidence, is no doubt to be ruled as a question of law. In some cases, too, the necessary inference from the proof is so certain that it may be ruled as a question of law. If a sane man voluntarily throws himself in contact with a passing engine, there being nothing to counteract the effect of this action, it may be ruled as a matter of law that the injury to him resulted from his own fault, and that no action can be sustained by him or his representatives. So, if a coach-driver intentionally drives within a few inches of a precipice, and an accident happens, negligence may be ruled as a question of law. On the other hand, if he had placed a suitable distance between his coach and the precipice, but by the breaking of a rein or an axle, which could not have been anticipated, an injury oc-

curred, it might be ruled as a question of law that there was no negligence and no liability. But these are extreme cases. The range between them is almost infinite in variety and extent. It is in relation to these intermediate cases that the opposite rule prevails. Upon the facts proven in such cases, it is a matter of judgment and discretion, of sound inference, what is the deduction to be drawn from the undisputed facts. Certain facts we may suppose to be clearly established from which one sensible, impartial man would infer that proper care had not been used, and that negligence existed; another man equally sensible and equally impartial would infer that proper care had been used, and that there was no negligence. It is this class of cases and those akin to it that the law commits to the decision of a jury. Twelve men of the average of the community, comprising men of education and men of little education, men of learning and men whose learning consists only in what they have themselves seen and heard, the merchant, the mechanic, the farmer, the laborer; these sit together, consult, apply their separate experience of the affairs of life to the facts proven, and draw a unanimous conclusion. This average judgment thus given it is the great effort of the law to obtain. It is assumed that twelve men know more of the common affairs of life than does one man, that they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge."

In the case of *Union Pacific Ry. Co.* v. *McDonald*, 152 U. S., 262, l. c., 275, decided as late as 1893, the United States Supreme Court, in its opinion, said: "The principles announced in *R. R. Co.* v. *Stout* have been approved in many adjudged cases." And at page 279, in the same opinion, the United States Supreme Court says: "We adhere to the principles announced in *R. R. Co.* v. *Stout, supra.*" See also *Marande* v. *R. R. Co.*, 184 U. S.,

173, which is precisely in point and the latest utterance of the United States Supreme Court. In this case, as appears from the written opinion of the learned trial court, there were four specifications of negligence relied upon by the plaintiffs in their petition:

(1) That the railway company was negligent in the detention of plaintiffs' cattle at Wellington and Strong City, Kansas, and that the company could have carried said cattle to Atchison, Kansas, by way of Topeka and delivered the same to a connecting carrier at that point.

(2) That defendant company was negligent after thus detaining the cattle at Wellington and Strong City, in not further detaining and holding them in those places until the flood, which had been on in the Kaw river, had subsided.

(3) That the company was negligent in diverging and deviating the shipments to Kansas City, and in taking the cattle into the lowlands at the mouth of the river in front of the approaching flood. And

(4) That the company was negligent in failing to move or cause to be moved the cattle from their position of peril in the stock yards at Kansas City before the arrival of the climax of the flood.

All of these acts of negligence were continuous and connected, constituting one uninterrupted and continuous negligence, and all arising after the inception of the flood and not anterior to it.

In cases of negligence, where the negligence consists of the failure to perform some positive duty created by law, the question of negligence is a question of law where the facts are undisputed, but in cases like this, where the negligences are violations of duties to be asecrtained and found as facts by the jury under instructions of the court, it cannot be said that the question of negli-

gence to perform the duty so found is ever a question of law.

In this case the question of negligence on the part of the defendant company with respect to all of the assignments of negligence, was a question to be determined as a mixed question of law and fact by the jury. It was the duty and province of the jury to determine what the duty of the defendant company was with respect to each and all of the four assignments named, and having determined the duty under the instructions and guidance of the court, then it was the province of the jury to determine whether the company was guilty of negligence in the discharge of the duty so found. See Vol. 8, Rose's Notes on U. S. Rep., where the cases following and citing the case of *R. R. Co.* v. *Stout, supra,* are collected.

If it was the duty of the court in this case to pronounce judgment on the issue of negligence, on the ground that the facts on that issue were undisputed, then that judgment should have been for plaintiffs and not for defendant.

IV.

The question of proximate cause was also a question for the jury, and not for the court, and the court erred in not submitting the question of proximate cause to the jury. This was the distinct proposition ruled in the case of *Milwaukee & St. Paul Ry. Co.* v *Kellogg*, 94 U. S., 469. In that case it was adjudged by the United States Supreme Court that "the question as to what is the proximate cause of an injury is ordinarily not one of science or of legal knowledge, but a fact for the jury to determine in view of the accompanying circumstances." In the opinion in that case the Court said: "The assignment presents the oft-embarrassing question, what is and what is not the promimate cause of an injury. The point

propounded to the court assumed that it was a question of law in this case; and in its support the two cases of *Ryan* v. *The New York Central Railroad Co.*, 35 N. Y., 210, and *Kerr* v. *Pennsylvania Railroad Co.*, 62 Penn. St., 353, are relied upon. Those cases have been the subject of much criticism since they were decided; and it may, perhaps, be doubted whether they have always been quite understood. If they were intended to assert the doctrine that when a building has been set on fire through the negligence of a party, and a second building has been fired from the first, it is a conclusion of law that the owner of the second has no recourse to the negligent wrongdoer, they have not been accepted as authority for such a doctrine, even in the States where the decisions were made. *Webb* v. *The Rome, Watertown, & Ogdensburg Railroad Co.*, 49 N. Y., 420, and *Pennsylvania Railroad Co.* v *Hope*, 80 Penn. St., 373. And certainly they are in conflict with numerous other decided cases. *Kellogg* v. *The Chicago & Northwestern Railroad Co.*, 26 Wis., 224; *Perley* v. *The Eastern Railroad Co.*, 98 Mass., 414; *Higgins* v. *Dewey*, 107 Id., 494; *Tent* v. *The Toledo, Peoria & Warsaw Railroad Co.*, 49 Ill., 349. The true rule is, that what is the proximate cause of an injury is ordinarily a question for the jury. It is not a question of science or of legal knowledge. It is to be determined as a fact, in view of the circumstances of fact attending it. The primary cause may be the proximate cause of a disaster, though it may operate through successive instruments, as an article at the end of a chain may be moved by a force applied to the other end, that force being the proximate cause of the movement, or as in the oft-cited case of the squib thrown in the market-place." We are not aware that that explicit ruling by the United States Supreme Court has ever been reversed or modified, and it would not be helpful to cite other cases affirming the

same proposition. The cases following and reaffirming the above proposition in the Kellogg case, that the question of proximate cause is one for the jury, may be found collected in Vol. 9 of Rose's Notes on the U. S. Rep., p. 125.

V.

The errors of the trial court in this case, we think, will be abundantly manifest from the opinion of the trial court itself. That opinion is reported in full in Vol. 135, Fed. Rep., 135, and also is reported in the printed record in this case (page 645, Record). We will quote herein from the opinion by the pages thereof as it appears in the Federal Reporter. At the bottom of page 140, the learned trial judge says: "It is not enough in this case that plaintiffs show that some act of negligence of the defendant furnished the occasion for the loss, or that some act of negligence of the defendant contributed to the injury." We submit that this statement of the law is erroneous. The trial judge decided that, even though the negligence of the defendant contributed to the injury, still the defendant was not liable. This, we submit, is not the law. We do not believe that any authority can be found anywhere which affirms non-liability where the negligence of the defendant contributed with the act of God to produce the injury. Even the case of *R. R. Co. v. Reeves*, 10 Wallace, 176, which is relied upon as the leading case on the other side, distinctly and throughout recognizes liability on the part of the carrier if its negligence contribute, with the act of God, to produce the injury, and we do not believe any decision can be found anywhere, save and except alone the decision of the trial judge in this case, which affirms non-liability where the company's negligence contributed to produce the damage and injury.

Again, at page 143, the trial court, in its opinion in this case, used the following language: "It may be conceded that the cattle need not have been brought into Kansas City in the first instance, or, being in, that they could have been removed in the cars in which they arrived, or in others or on foot. Guided by events that followed as now seen by us today, the cattle no doubt should and unquestionably would have been removed from their place of peril." The duty of the defendant company was no different after the flood was over than it was before. If, as the learned judge says, the cattle "could have been removed in the cars in which they arrived, or in others or on foot," then it was a question for the jury to say whether, as was done by other owners of live stock, it was the duty of the defendant company to have removed the cattle in the cars in which they arrived, or in others or on foot, and whether the company was guilty of neglect of that duty. The court says that the defendant company could have removed the cattle, either in the cars or in others or on foot, and then the court says that, as matters seem to us now, "the cattle undoubtedly should and unquestionably would have been removed from their place of peril." As the flood had been on for a week in advance of the bringing of the cattle to Kansas City, what reason was there for the court saying, as a matter of law, that the duty of the company was any different during that entire week than what that duty now seems to have been? If the flood at Kansas City on that fatal Sunday had come suddenly and without warning, like a thief in the night, or a cyclone in a breath, there might be some reason for distinguishing between what the duty of the company as it seems now and what it was before the coming of that cyclone, and if the cattle "undoubtedly should and unquestionably would have been removed from their place

of peril," how can the court say, as a matter of law, that the company was not negligent, and that that negligence did not contribute to produce the injury? Then the court follows the above language by the following: "That these circumstances and acts of the defendant company furnished an occasion for the loss is unquestionable, but that the direct and proximate cause of the loss and damage was the unprecedented and unexpected flood and attendant destruction that came wholly without anticipation on the part of the defendant company." These last quoted remarks are subject, as it seems to us, to several criticisms. In the first place the flood was not unexpected. The flood had been on over a week. The rains causing the flood had been falling a month. The flood in the Kaw valley was on when the cattle arrived at Strong City. The cattle were delayed two days and over at Strong City, in consequence of the flood. The deviation which took place at Strong City and Emporia was in consequence of the flood. All of the acts of negligence charged against the defendant company took place after the flood was on. The defendant's lines from Emporia to Topeka and from there to Atchison and from Topeka to Kansas City were all flooded before the deviation, and defendant came to Kansas City with these cattle over another road. In view of all these facts, the remark of the court that the flood was "unexpected" is rather remarkable. If, after the plaintiffs' cattle had been put in the stock yards, they had been injured and damaged by a cyclone or fire, there would be some reason for saying that such cyclone or fire, being wholly unexpected, was the proximate cause of the injury. But it is not correct in this case to say that the flood was at any time unexpected after the arrival of the cattle at Strong City. Nor was it correct for the learned trial judge to say in his opinion that the flood was without

anticipation at the time it reached its climax on Sunday, for the reason that on Saturday, the day before, under the direction of the general superintendent of the company, the defendant moved 1,300 or 1,400 cars from its yards in Argentine to the highest place where the cars could be placed at Kansas City. There were 1,400 cars altogether, and the very best that the company could do with those cars was done. They could not have been taken out of the Kaw valley at Kansas City, but they were placed upon the highest ground possible in Kansas City. But while those cars were left, as they were forced to be left, in the bottoms at Kansas City, the company not having sufficient means to take them away or out of the bottom, still the plaintiffs' cattle could have been taken out by being driven out as other people drove out their live stock. And in view of this action of the defendant company with respect to said 1,400 cars on Saturday, it will not do to say in this case that the flood which had been on for a week was, on Sunday following that Saturday, "without anticipation on the part of the defendant company." It may not have anticipated that the flood would reach the heights it reached, but for more than two days before it reached its climax on Sunday, it knew full well that a flood so large and dangerous as to flood all its Kansas lines of railway over which these cattle could be shipped, was on, and that that flood was rising higher hourly from the increasing and unprecedented rains which had continued with slight intervals nearly a month. The learned trial judge in his opinion, at pages 138 and 139, summarizes the fact in words as follows: "It appears from the evidence that "during the greater part of May, 1903, unusual and "unprecedented rains fell in the watershed of the Kansas "river, which empties into the Missouri river at Kansas "City. To such an extent was this true that a vast

"amount of property located in the valley was inundated "and destroyed by high water in the Kaw river following "in consequence of such rain. The railways running "along and across this valley were overflowed and the "property destroyed. * * * At the time the cattle "were carried to Kansas City by the defendant company, "its lines of road from Topeka to Atchison and from "Topeka to Kansas City were submerged by the flood, "and could not be operated." In addition to the fact thus stated by the trial judge the evidence showed that Friday night, which was before the arrival of the cattle at Kansas City, a sudden rise, something like a tidal wave, reached Topeka in its onward flow down the valley of the Kaw river.

In view of these conceded facts, the conclusion of the learned trial judge that the flood was unexpected as expressed in his words cited above: "That these circum- "stances and acts of the defendant company furnished "an occasion for the loss is unquestionable, but that the "direct and proximate cause of the loss and damage was "the unprecedented and *unexpected* flood and attendant "destruction that came wholly *without anticipation* on "the part of the defendant company," is absolutely without support or foundation.

In support of the proposition that contributory negligence of the carrier renders it liable, notwithstanding the act of God relied on by it as the cause, see the following authorities from which citations are made in our argument following these points, viz.:

Szeczey v. *Philadelphia*, 64 Pa. St., 106; *Helbling* v. *Cemetery Co.*, 201 Pa. St., 171; *Morrison* v. *Davis*, 20 Pa. St., l. c., 176-177; *Williams* v. *Grant*, 1 Conn., 487; *Wallace* v. *Clayton*, 42 Ga., 443; *R. R. Co.* v. *White*, 88 Ga., 805; *Merritt* v. *Earle*, 29 N. Y., 115, l. c., 116f; *Michaels* v. *R. R. Co.*, 30 N. Y., 564, l. c., 570; *Bibb*

Broom Corn Co. v. *A. T. & S. F. Ry. Co.*, 102 N. W. Rep. (Minn. Sup. Ct.), p. 709; *R. R. Co.* v. *Curtiss*, 80 Ill., 324; *Wald* v. *R. R. Co.*, 162 Ill., 545; *Blodgett* v. *Abbott*, 72 Wis., 516; *Nelson* v. *Ry. Co.*, 72 Pac. Rep. (Mon. Sup. Ct.), p. 643, l. c. 651; *Steamboat Co.* v. *Tiers*, 24 N. J. Law Rep., 697; *R. R. Co.* v. *David*, 6 Heisk, 261; *McGraw* v. *R. R. Co.*, 18 W. Va., 361; *Smith* v. *Ry. Co.*, 91 Ala., 455, l. c., 456; *Coosa Steamboat Co.* v. *Barclay*, 30 Ala., 12, l. c., 127; *Nugent* v. *Smith*, 1 C. P. Div., 19 and 423; Vol. 1, Am. & Eng. Enc. of Law (2nd Ed.), 595; Vol. 5, Am. & Eng. Enc. of Law (2d Ed.), 234; Hutchinson on Carriers, Secs. 181, 187, 188; Vol. 6, Cyc. of Law & Proced., 377, 384; *Strauss* v. *Ry. Co.*, 17 Fed. Rep., 209, l. c., 212; *Caldwell* v. *Sou. Ex. Co.*, 4 Fed. Cas., No. 2303, p. 1036; *Thompkins* v. *Duchess of Ulster*, 24 Fed. Cas., No. 14087a, p. 32; *Southern Pac. Co.* v. *Schoer*, 52 C. C. A., 269, l. c., 274; *Newport News Co.* v. *U. S.*, 9 C. C. A., 579; *Clark* v. *Barnwell*, 12 How., 272, l. c., 280; *Holladay* v. *Kennard*, 12 Wall., 254; *Gleason* v. *R. R. Co.*, 140 U. S., 433; The Majestic, 166 U. S., 376, l. c., 386.

VI.

At page 142 the learned trial judge in his opinion upon the branch of the case relating to deviation, frankly admits as follows: "The route originally contemplated by the parties was to Atchison and thence by the Burlington," and the following remark shows clearly that the learned trial judge recognized the line of railway of the defendant from Strong City to Topeka and from there to Atchison as the line over which the cattle were routed. The learned trial judge on the same page, 142, on this branch of the case further says: "By this time it was impossible for the defendant to carry the cattle over its

line to Atchison, or to carry them to Kansas City otherwise than the way they were carried; that the contract of shipment and the circumstances, common business prudence and the law, as well, authorized a departure *from the originally intended route of shipment,* I have no doubt, unless the defendant knew or should have known that by such departure the safety of the shipment would be endangered." This is all that is said by the learned trial judge on the subject of deviation. The above remarks, as it seems to us, are subject to several criticisms. In the first place, according to all of the authorities, as will hereafter be shown in this brief, the defendant company was not authorized to deviate or take the cattle away from Strong City if they were in a safe place at Strong City. If, as the learned judge says, it was impossible for the defendant to carry the cattle over its line to Atchison, or even to Kansas City, otherwise than by another road, namely, the San Francisco Railroad, what reason was there for the defendant to suppose that it could get the cattle out by a roundabout transit through Kansas City, and thence up through the Missouri valley over practically the same route the cattle would have to go from Atchison northward? The flood was coming down the Kaw river. If the flood was so bad at Topeka that the cattle could not be crossed there, what reason was there for supposing that the cattle could be gotten across at Kansas City? The cattle were in a safe place at Strong City and should have been left there. By the deviation of the cattle from Strong City they were taken from a safe place into what was then known to be a hazardous place. If the cattle, as the defendant company well knew, could not be taken across the Kaw river at Topeka, then the Kaw river at Topeka was certainly a hazardous place, and if the Kaw river at Topeka was a hazardous place, most certainly the Kaw

river at Kansas City would be a hazardous place by the time the shipment arrived there. In all the cases of deviation where the court has sustained the devitaion, it was because the cattle were in an unsafe place at the time of deviation. The cattle were in a safe place at Strong City. They were there in the feed lots of the defendant company, far removed from the Kaw valley. In all of the cases where deviations have been sustained, the line to which the deviation has been made was not beset with any of the troubles which made the deviation necessary. In this case the line to which the cattle were deviated was a more dangerous line than the line of railway on which the cattle were originally routed. Again, on this subject of deviation, all the authorities agree that even when the deviation is made necessary the carrier should consult the owner of the cargo shipped. At page 137 the trial court, in its opinion, said: "The cattle were accompanied at all times by the owners of the stock or their representatives in charge, signing the contracts." The deviation in this case was absolutely wrongful for the reason that the company never consulted with the owners or parties in charge of the stock. The deviation of the cattle to Kansas City was both wrongful and negligent. If it was negligent, which was a question for the jury, the company was liable on that ground. If the cattle were safe at Strong City, then it was unnecessary, and therefore wrongful, and if wrongful, the defendant is liable. If the deviation from Strong City to Kansas City was made without the consent of the shippers, then, according to all the authorities, it was wrongful and the company is liable on that ground alone. The learned judge, at page 142, in the language we have cited above, says that the deviation was justifiable "unless the defendant knew or should have known that by such departure the safety of the shipment would be endangered."

These words bear upon the question of negligence, but, as we have seen, the deviation was wrongful, for there was no necessity for taking the cattle from Strong City, and because, as is the conceded fact in the case, they were taken without the consent of the shippers.

At the bottom of page 142 and top of page 143 of his opinion, the learned trial judge couples the bringing of the cattle to Kansas City and putting them in the Kansas City stock yards as one act. This is erroneous. When the cattle were deviated at Strong City and Emporia it was with the purpose on the part of defendant company to deliver them to the Missouri Pacific Railway Company at Kansas City, and that that company would carry the cattle from Kansas City to Omaha, up the same Missouri river valley up which the cattle were originally routed to go over the Burlington from Atchison to Council Bluffs. The defendant company did not intend to deposit and leave the cattle in the Kansas City stock yards until after their arrival in Kansas City. At the top of page 143 the learned trial judge speaks somewhat eloquently of the safety in ordinary times of the Kansas City stock yards. The defendant company was, from the arrival of the cattle at Strong City, not acting in ordinary times. One of three great floods of 1844, 1881 and 1903 was already on when the cattle reached and left Strong City. An ordinary safe warehouse in Chicago was not a proper place in which to deposit goods during the great Chicago fire, much less was it a proper place to which to deviate a shipment not destined to that city. (*Mer. Dis. Tr. Co.* v. *Kahn*, 76 Ill., 529.) The Kansas City stock yards on May 30th and 31st, 1903, was as unsafe a place in which to deposit these $100,000 worth of cattle as was a Chicago warehouse during the great fire in that city. This being so, it is immaterial whether the purpose to put the cattle in the Kansas City stock yards originated at Strong City and Emporia, or after

the arrival of the cattle at Kansas City. The learned trial judge, at the top of page 143, in speaking of the Kansas City stock yards, eloquently says, "that in all the "history of these yards they had not been overflowed or "endangered by overflow." One would think from this remark that those yards were a very ancient institution. The facts are that neither those yards or Kansas City itself were even dreamed of until sometime after the flood of 1844, and that those yards did not have anything more than an embryo existence until after the flood of 1881. The foregoing propositions, as to the effect of the admitted deviation in this case and the consequent liability of defendant, are abundantly sustained by the authorities: *Crosby* v. *Fitch*, 12 Conn., 410, l. c., 419, 420, 423; *R. R. Co.* v. *Beck*, 125 Pa. St., 620; *Phillips* v. *Bingham*, 26 Ga., 617; *R. R. Co.* v. *Cole*, 68 Ga., 623; *Cassilay* v. *Young*, 4 B. Mon., 265; *Singer* v. *R. R. Co.*, 31 Me., 228, l. c., 238; *R. R. Co.* v. *Washburn*, 22 O. St., 324; *Ex. Co.* v. *Smith*, 33 O. St., 511; *Brown Co.* v. *R. R. Co.*, 63 Minn., 546; *Hedricks* v. *Steamship Co.*, 18 La. Ann., 353: *Hastings* v. *Pepper*, 11 Pick., 41; *Proctor* v. *R. R. Co.*, 105 Mass., 512: *Ry. Co.* v. *Allison*, 59 Tex., 193; *Johnson* v. *Ry. Co.*, 33 N. Y., 610, l. c., 611; *Goodrich* v. *Thompson*, 44 N. Y., 324; *Maghee* v. *R. R. Co.*, 45 N. Y., 514; *Keeney* v. *Ry. Co.*, 47 N. Y., 525; *Robertson* v. *Nat. S. S. Co.*, 14 N. Y. Sup., 313 *Seavey Co.* v. *Union Trans. Co.*, 106 Wis., 394; *Ry. Co.* v. *Brichetto*, 72 Miss., 891; *R. R. Co.* v. *Odil*, 96 Tenn., 61; *Mer. Dis. Tr. Co.* v. *Kahn*, 76 Ill., 520; Vol. 1, Am. & Eng. Enc. of Law (2d Ed.), 594; Vol. 5, Am. & Eng Enc. of Law (2d Ed.), 422, 426; Hutchinson on Carriers, Secs. 190, 191; Lawson on Bailments, Sec. 127; Vol. 6, Cyc. of Law & Procedure, 383, 384; *Marsh* v. *Un. Pac. R. R. Co.*, 9 Fed. Rep., 873; *Ins. Co.* v. *LeRoy*, 7 Cranch., 26; *Hostetter* v. *Park*, 137 U. S., 30, l. c., 40; *Constable* v. *Steamship Co.*, 154 U. S., 51, l. c., 61.

VII.

We submit that the opinion of the trial judge is not supported by the authorities cited therein.

In the case of *R. R. Co.* v. *Wentworth*, 27 S. W. 680, cited by the trial court in its written opinion in this cause, it appears that the sheep which were being transported by the railway company from Texas to Chicago were overtaken while *en route* by a flood, which prevented the further transportation of the sheep on the line on which they were routed, and under those circumstances the railway company deviated the shipment of the sheep over another line on which there was no flood, which involved of necessity a delay, requiring, as it did, more time on the deviated line to get to Chicago than it required over the line on which they were routed. But in that case the sheep could not have been taken to Chicago by reason of the flood over the line over which they were routed, and since the action there was damage to the sheep by delay, the court held that there was no right of action since the sheep were gotten to Chicago in much less time than was necessary to take them by waiting until the flood subsided. There was no flood in that case along the line to which the sheep were deviated, and since the line on which they were routed was wholly obstructed by a flood the court held that the deviation was proper and necessary. The court, in passing on this point, says: "In this case the deviation from the usual or stipulated route was caused by unprecedented floods which rendered it absolutely necessary for the sheep to be carried over the Cotton Belt instead of the St. Louis, Iron Mountain & Southern Railroad, to prevent their loss or at least a much greater delay than actually occurred."

It seems to us that Sec. 311, Hutchinson on Carriers, which is cited by the trial judge in his opinion in con-

nection with the above Texas decision, is an authority against the learned trial judge rather than in favor of his conclusion.

In the case of *Snow* v. *Ry. Co.*, 9 N. E., 702, which in this connection is also cited by the learned trial judge in his opinion, the court held that where the contract was silent as to what line of road the initial carrier should deliver the shipment, that the carrier might select any customary and reasonably safe and direct road of railway to which the initial carrier should deliver the shipment at the terminus of its line, and that since the contract was in writing it was not competent for the parties to prove by parol evidence a prior verbal agreement specifying a certain route. However, we suggest that this decision does not bear upon the question of deviation. This decision with the two authorities above cited was cited by the trial judge in his opinion to sustain the proposition in this case that the defendant railway company was authorized and justified in its deviation of the plaintiffs' cattle from Strong City to Kansas City, but the above decision in the Snow case does not bear upon the question of deviation at all. That decision in the Snow case only bears upon the question of what would be the railway companies right in this case in the selection of a carrier at Atchison if it had carried the cattle by way of Topeka to Atchison. It does not throw any light upon the question of deviation from Strong City and Emporia to Kansas City.

Another decision cited by the learned trial judge in his opinion was the one given by this court in *Ry. Co.* v. *Elliott*, 55 Fed. Rep., 949, 5 C. C. A., 347. An extract from the opinion of Judge Sanborn in that case is contained in the opinion of the trial judge in this case, but the facts in the Elliott case do not serve to throw any light upon the case at bar, as a brief reference thereto

will show. In the Elliott case the plaintiff was in charge of certain stock shipped by rail and was riding in the caboose. Before reaching a certain station where he knew it was usual to change cabooses, he asked the conductor if a change would be made there and was answered in the negative and told that the train would only stop a few moments and he would have no time to examine his stock. On reaching the station, however, he got off, walked forward and examined several cars of the stock, and then turned back, but the train having already started he feared he would be unable to board the caboose and therefore climbed upon a stock car and walked backward along the top of the train. Before he reached the caboose the train had stopped and was backing for the purpose of changing the caboose, and it was kicked off from the train just as he was stepping upon it, causing him to fall to the track, where his foot was crushed by a wheel. And it was held by this court in that case that the statement of the conductor that the caboose would not be changed was not the proximate cause of the injury. The remarks of the court in its opinion in that case, while applicable and proper in disposing of that case on those facts, we submit throw no light upon this case and have no application to it. And it may be observed in this connection that the opinion in said Elliott case is the only opinion of this court cited by the learned trial judge in his very able and exhaustive opinion.

The case of *Ry. Co.* v. *Kellogg*, 94 U. S., 469, is one of the authorities cited by the trial judge in his opinion. In that case there was a verdict and judgment in the trial court against the railway company, based upon the act of the railway company burning the saw mill of the plaintiff on the banks of the Mississippi river. The charge against the railway company was that the fire was negligently communicated from the defendant railway's

steamboat "Jenny Brown" to an elevator built of pine lumber owned by the defendant and standing on the bank of the river, and that the fire was communicated to the plaintiff's saw mill and lumber piles while an unusually strong wind was blowing from the elevator towards the mill and lumber. The Supreme Court of the United States affirmed the verdict and judgment against the railway company. The court in its opinion in that case held that the question as to what is the proximate cause of an injury is ordinarily not one of science or of legal knowledge, but a fact for the jury to determine in view of the accompanying circumstances. It seems to us that the trial judge in this case not only did not follow the opinion of the United States Supreme Court in that case, but plainly disregarded it. It has been the recognized rule of the United States Supreme Court, ever since its decision in said Kellogg case, that it is for the jury to determine the question of proximate cause in this class of cases. The Spreme Court in that case adjudged that the finding of the jury in that case that the burning of plaintiff's mill and lumber was the unavoidable consequence of the burning of the defendant's elevator, which had been caused by their negligence, was in effect a finding that there was no intervening and independent cause between the negligent conduct of the defendants and the injury to the plaintiff. The opinion of the court in the Kellogg case proceeds throughout upon the idea that the question in this class of cases of proximate cause is one of fact for the jury, and we repeat that it is difficult to understand just how the learned trial judge in his opinion in this case felt justified in citing the opinion in the Kellogg case in support of his action directing a verdict for the defendant.

In the case of *Insurance C.* v. *Tweed*, 7 Wallace, 44, which is another authority cited by the learned trail

judge in his opinion, it was held that the defendant was not liable because in that case there was a new, intervening cause of the injury, which relieved the defendant from liability. In that case the plaintiff's cotton in a warehouse was insured against fire. The insurance company's policy contained an exception against fire which might happen by means of an explosion. An explosion took place in another warehouse across the street, resulting in an extensive conflagration embracing several squares of buildings, and among them the warehouse where the cotton in question was stored, which was wholly consumed. The fire was not communicated from the warehouse where the explosion took place directly to the warehouse where the cotton was, but first consumed several intermediate buildings, but the whole fire was a continuous affair from the first explosion and in full headway in about half an hour. The court held under those facts that by reason of the exception in the policy the company was not liable. We submit that it is not indicated in the learned opinion of the trial judge in this case how the said decision in the Tweed case was in any way applicable to the case at bar.

The case of *Ry.* v. *Reeves*, 10 Wallace, 176, which is also cited by the learned trial judge in his opinion, is one of the principal cases, if not the principal case, relied upon by the defendant in error. In the Reeves case there is to be found in the opinion no intimation that the question of proximate cause was not one for determination by the jury. The case was tried in the trial court by a jury and a verdict given against the railway company. The judgment on that verdict was reversed by the United States Supreme Court and a new trial ordered. The reversal is based upon misdirection by the trial court of the jury, but there is no intimation anywhere in the short opinion delivered by Mr. Justice Miller that the

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question of proximate cause was a question to be determined by the court and not by the jury. The opinion throughout proceeds upon the theory that the question of proximate cause was one for the jury, to be determined by that tribunal under proper instructions of the court, and that the trial court in that case had not given proper instructions. In the opinion in that case it was also adjudged that the carrier, notwithstanding the fact of the existence of an act of God in the form of a storm or flood, is required nevertheless to exercise ordinary diligence to avoid or remedy the effects of the overpowering cause. The injury to the shipment in the Reeves case occurred at Chattanooga, where Mr. Justice Miller says: "There was a most sudden, violent and extraordinary flood." There was, however, nothing in the Reeves case to show that the carrier for four or five days prior to the damage at Chattanooga had held up the shipment for several days 150 or 200 miles distant from Chattanooga, and there was nothing in the Reeves case to show that the carrier had several days' time within which it knew of the existence of the flood, and the facts of that case render it entirely different from the case at bar. There was no deviation in the Reeves case. The court in its opinion in the Reeves case says: "If after he has excused himself by showing the presence of an overpowering cause, it is charged that his negligence contributed to the loss, the proof of this must come from those who assert or rely on it." This language is a clear recognition of the proposition that contributory negligence on the part of the carrier, co-operating with the act of God to produce a loss, renders the carrier liable. Indeed, this proposition could not be denied, being sustained by all of the authorities. However, the learned trial judge in his opinion in this case says: "It is not enough in this case that plaintiffs show that some act of negligence of

the defendant furnished the occasion for the loss or that some act of negligence of the defendant contributed to the injury." We think that the opinion of the trial judge in this case is the only one that will probably be found in the books, where it is asserted that the contributory negligence of the carrier, co-operating with the act of God, does not render the carrier liable. In the Reeves case the trial court by its 5th instruction told the jury that if the damage could have been prevented by any means within the power of the defendant or his agents, and such means were not resorted to, then the jury must find for the plaintiff. The court in the opinion of Justice Miller adjudged that the rule of this instruction was too stringent and reversed the judgment and remanded the case for a new trial.

The case of *Scheffer* v. *R. R.*, 105 U. S., 249, is also cited by the learned trial judge in his opinion. In that case by reason of a collision of railway trains in Virginia a passenger was injured and, becoming thereby disordered in mind and body, he, eight months after his injury, committed suicide, and it was held in that case, which was a suit by his personal representatives against the railway, that his own act of suicide was the proximate cause of his death.

In the case of *Ry. Co.* v. *Ins. Co.*, 139 U. S., 223, which is also cited by the learned trial judge in his opinion, it appears that the railway company had contracted with a compress company to receive and transport all cotton brought by its owners to the warehouse of the company. The railway company neglected to do this, a large mass of cotton was piled and kept by the compress company in the adjoining street, where the cotton thus collected was destroyed by fire from an unknown cause. It was held that the railway company was not responsible for the loss to the owners of the cotton destroyed, for the

reason that the railway company had given no bills of lading for the cotton in the street and the railway company had in fact assumed no custody or control of any of the cotton in the street or of the place where it was kept.

In the case of *The R. D. Bibber,* 50 Fed. Rep., 841, which is also cited by the learned trial judge in his opinion, it appears that a schooner loaded with a cargo of rails to be transported under a bill of lading which excepted liability from dangers of the seas, arrived off the bar at Galveston Harbor. While crossing the bar the vessel from some unknown cause went fast aground. The following night a storm arose which lasted two days and drove the vessel half a mile from the channel and on some shoals. The owner of the cargo brought suit against the vessel to recover the damages, alleging that the stranding was caused by the negligence of the master in not properly lightering the schooner before attempting the bar. The court there held that the grounding of the schooner was not due to the negligence of the master, and that the subsequent storm which arose the following night was the proximate cause of the injury. The case there might have some application to the case at bar if, after the cattle in controversy in this case had nearly reached Emporia while in transit, they had been overtaken by a sudden cyclone, throwing the train off the track and killing the cattle. On those facts the decision in the Bibber case and the decision in the Reeves case might apply; but in the case at bar the negligence of the defendant company commenced and continued after the flood was on and until the climax of the flood was reached. Indeed the negligence of the defendant company seems to have increased from the time of the arrival of the cattle at Strong City until the climax of the flood, in about the same proportion as the increase of the flood.

In the case of *Thomas* v. *Lancaster Mills,* 71 Fed. Rep., 481, which is another authority cited by the learned trial judge in his opinion, it was held that the fact that the destruction of a shipment by fire, occurring during a negligent delay on the part of a carrier in forwarding it, does not render such delay the proximate cause of the loss. That decision would have some application to the case at bar if the cattle of these plaintiffs had been destroyed by a sudden and unexpected fire at Emporia after the two days' negligent delay at Strong City; but in the case at bar, as we have seen, the negligence of the railway company from its commencement at Strong City until the climax of the flood, existed throughout from beginning to end after the flood was on. This flood was not a sudden affair like a fire, a cyclone or a thunder storm It had continued for several days. In the above cases cited by the learned trial judge, if the carrier had been negligent during or after the fire or the storms, or while the fire or storms were on, as in the case at bar, the court would, we think, not have said that the carrier was exempt from its contributory negligence. In the cases cited by the learned trial judge the negligence in each case existed some time anterior to the fire or flood, which in each case came on suddenly and unaware, and did not in any of the cases exist previously to the negligence of the carrier.

The case of *Hoag* v. *R. R. Co.,* 85 Pa., 293, which is also cited by the learned trial judge in his opinion, does not have any application in its facts to the case at bar.

VIII.

We submit that the error of the trial judge is further shown by the following clause of his opinion at page 140: "That it was wholly unanticipated in height and "destructive force is manifest by the undisputed fact

"that millions of dollars worth of property was placed "and left in the valley here at Kansas City by the own- "ers thereof, which was inundated and destroyed." But that "millions of dollars worth of property consisting "as it did of inanimate houses, stocks of goods and fur- "niture therein was placed and left in the valley here "at Kansas City by the owners thereof" long before the commencement of this flood, and it was not possible to move either those inanimate buildings or the immense stores therein at any time during the last week of the flood. There is another fact in this connection not mentioned in the learned opinion of the trial judge: There was not a single head of cattle in any of the Kansas City packing houses when the flood reached its climax, and only a comparatively small number of cattle, in addition to the large bunches of these plaintiffs', was in Kansas City stock yards, although its daily receipts were up into the thousands and tens of thousands of cattle. Sparks Bros. had driven their large herd of mules out of the valley and nearly all the animals which have legs to walk upon were shipped or driven out in time to be saved, and the evidence does not show any live stock loss worthy of mention, except the loss of these plaintiffs.

IX.

At the bottom of page 138 the learned trial judge in his opinion seems to assume that it was necessary to drive the cattle up into the viaducts. The judge says: "To "save the cattle in question from drowning they were "driven up into overhead viaducts." It was unnecessary to drive the cattle up into the viaducts, where they died for want of food and water, if as the trial judge found they could and should have been driven up out of the valley or shipped out on cars as was done with other

live stock. The flood was not the cause of the death of the cattle that died in the viaducts. The cattle were not any of them drowned. They died for want of food and water in the viaducts where they were placed by a human agency, namely the defendant company. If the damage must be ascribed to the last, in the train and succession of events, as was the opinion of the learned trial judge, then the want of food and water in the viaducts where the cattle were driven by men, and not the flood considered as an act of God, was the direct, immediate and proximate cause of the loss. And if the driving of the cattle up into the viaducts was made necessary by the neglect of defendant to drive or ship the cattle up out of the valley, then such negligence and the act of driving the cattle up into the viaducts were the last, efficient, immediate and direct cause of the loss and damage. Some of the authorities agree that where human agency containing no element of negligence contributes to produce the loss, the carrier is not excused by the act of God.

Steamboat Co. v. *Tiers*, 24 N .J. Law, 697; The Majestic, 166 U. S. 376, l. c., 386; *Merritt* v. *Earle*, 29 N. Y., 115, l. c., 116; *Michales* v. *R. R. Co.*, 30 N. Y., 564, l. c., 570, cited in 154 U. S., 66.

X.

The several acts of negligence charged in plaintiffs' petition constitute in their entirety one continuous negligence on the part of the defendant. Each negligence followed the preceding negligences. All those negligences had relation to the flood which preceded them. The case ought not to be decided upon the narrow theory or basis that either one of the first negligences in the train, considered by itself, was not the proximate cause of the in-

jury. If the question of those negligences was a question of fact for the jury, then the trial court erred in not submitting that question to the jury. If the question of the liability of the defendant upon the train of successive negligences was a question for the court, because of the fact that the evidence is undisputed, then the trial court erred in not ruling that question in favor of the plaintiffs. If the evidence upon the question of the train of negligences is undisputed, then we submit that the undisputed fact shows a case of very gross and almost criminal negligence on the part of the defendant company from first to last, and continuing through all the train and continuation of negligences.

The case therefore on the branch of negligence upon either theory of fact or law, must, as it seems to us, be ruled in favor of plaintiffs and against defendant. Either the plaintiffs were entitled to a submission to and a verdict of the jury upon the issue of negligence on all the specifications, or plaintiffs were entitled to the judgment of the court thereon.

ARGUMENT.

I.

In the case of *Rwy. Co.* v. *Harris,* 12 C. C. A., 598, l. c., 602, this court adjudged in an opinion by Caldwell, J., concurred in by Judges Sanborn and Thayer, that where a plaintiff offers and is ready to produce competent evidence to prove a material fact in issue, and the court rejects it on defendant's objection, defendant will not afterwards be permitted to allege that plaintiff failed to prove the facts alleged in the offer of evidence. We submit that the very many items of evidence offered by plaintiffs and wrongly and erroneously excluded by the learned trial court should be considered by this court on these appeals with the other testimony of plaintiffs which, in some instances, was so reluctantly admitted.

II.

Upon the issue of negligence we refer to the following authorities:

In the case of *Livezey* v. *Philadelphia,* 64 Pa. St., 106, l. c., 108, the court in an opinion delivered by Sharswood, J., recognized the principle that where negligence concurs with the act of Providence in causing the injury the defendant is liable, and an opinion of Chief Justice Gibson is cited, recognizing that where the act of Providence was relied upon the happening of the injury must have resulted exclusively from such act of Providence. This does not harmonize with the opinion of the learned trial court in this case that contributory negligence does not render the carrier liable.

So in the case of *Helbling* v. *Cemetery Co.,* 201 Pa. St., 171, the court recognized that where the negligence

of the defendant concurs with the act of God in producing an injury the defendant is liable. In that case there was a judgment for the plaintiff against the cemetery company for $3,500, which was affirmed by the Pennsylvania Supreme Court. The suit by the plaintiff was brought because of injury by water during rain storms to plaintiff's house. The water accumulated at the opening of a city sewer which was on the land of the defendant cemetery company, which sewer received the surface drainage. The negligence of the cemetery company charged was that it had allowed large quantities of brush, weeds and grass to lie along the water courses near the opening of the sewer, and that this so clogged the water it did not have a free passage to the sewer. The defense was that the rainfalls were so extraordinary that their consequences could not be foreseen, and that the injury was therefore attributable solely to an act of God. The appeal presented the question of instructions to the jury in the trial court. The trial court instructed the jury that if the loss resulted wholly from extraordinary floods and not from any act of the defendant, the defendant was not liable. The trial court gave an instruction to the jury in words as follows: "If, however, the weight of the evidence satisfies you that the loss was the result of two concurrent acts, an extraordinary flood and some negligence of the cemetery company assisting in producing the loss, then the cemetery company would be liable." Under this instruction the jury found a verdict for the plaintiff, which was sanctioned both by the trial court and the Supreme Court.

In the case of *Morrison* v. *Davis,* 20 Pa. St., l. c., 176-177, the court used the following language: "We may here say a word as to the care required of carriers when they discover themselves in peril by inevitable accident. In such a case the law requires of them ordinary

care, skill and foresight. This is different in different cases, depending upon the degree of civilization, and in different circumstances depending upon the degree of peril. It is commonly defined as the common prudence which men of business and heads of families usually exhibit in matters that are interesting to them. It increases as difficulties increase. In great danger great care is the ordinary care of prudent men."

In the case at bar the learned trial court was of opinion that no matter how negligent the carrier may have been, still if there was a flood, or act of God as it is called, there is and can be no liability. The trial court seems also to be of opinion that the carrier must have known all the facts before the crisis of the flood that are known now in order to be liable. In the view of the trial court there is nothing left of the law of negligence and there can be no liability in this class of cases.

In the case of *Williams* v. *Grant*, 1 Conn., 487, the court adjudged that the striking of a vessel upon a rock not generally known, and not actually known to the master of the vessel, is *prima facie* an act of God, for which the carrier is not responsible. The court further adjudged that though the situation of the rock was not generally known and was not actually known to the master of the vessel, yet if he exposed the vessel to such accident by any culpable act or omission of his own the defendant was not excused. The verdict in the trial court was in favor of defendants, but the Supreme Court granted a new trial. In one of the opinions of the court in that case it is said, in speaking of dangers of the sea and unavoidable accidents, as follows: "In either case, however, it is a condition precedent to their exoneration that they should have been in no default, or, in other words, that the goods of the bailors should not have been exposed to the peril or accident which occasioned the loss

by their own misconduct, negligence or ignorance. For though the immediate or proximate cause of a loss in any given instance may have been what is termed the act of God or unavoidable accident, yet if the carrier unnecessarily exposed the property to such accident by any culpable act or omission of his own, he is not excused. I recollect a case put in some book to this effect: That if a common hoyman unnecessarily puts to sea under circumstances which render a loss of the goods on board probable, as in very tempestuous weather, he is liable in the event of a loss, though it were immediately occasioned by the elements, over which he had no control. This I take to be the law."

This case is approvingly cited by the United States Supreme Court in *Constable* v. *Steamship Co.*, 154 U. S., l. c., 66.

In the case of *Wallace* v. *Clayton*, 42 Ga., 443, the court adjudged that an unsual or extraordinary flood in a river is such an act of God as excuses a common carrier from his liability, at all events for goods he has undertaken to transport, but even in such case the carrier is bound to exercise the care of a very prudent man to preserve the freight entrusted to him for carriage. It was also held in that case that diligence and the want of it are questions of fact to be determined by the jury under the charge of the court. In its opinion in that case the court said: "It cannot for a moment be denied that a flood such as the evidence in this case discloses is an act of God in the sense of the books, which make such an act an exception to the influences against which a common carrier insures. Indeed the irresistible march of a mighty and unexpected flood is of all others the most terrible exhibition of the powers of nature and the helplessness of man. It is only the Ruler of the Universe who can say with authority to the rushing tide, 'Thus

far shalt thou come and no farther.' When such an event occurs, that rule which makes a common carrier liable at all events gives way. Angel on Carriers, 153-160. But it does not therefore follow that the carrier may fold his hands or that he is to be excused if he is negligent or fails in exercising the diligence of a very prudent man. That duty is always upon him. Even amid the fury of the storm or the rush of the flood he must use that prudence, discretion and energy which experience teaches very prudent men to use under such circumstances. If the loss be by reason of the want of extraordinary diligence in the carrier, then, though the agent of the loss be flood or storm, the carrier is liable. Angel on Carriers, 153-160."

The case of *Richmond R. R. Co.* v. *White*, 88 Ga., 805, is directly in point. In the state of Georgia, where that case arose, there was a statute which provided as follows:

> "Sec. 2066.—One who pursues the business, constantly or continuously for any period of time or any distance, of transportation is a common carrier, and as such is bound to use extraordinary judgment. In cases of loss the presumption of law is against him, and no excuse avails him unless it was occasioned by the act of God or the public enemies of the state."

This last clause of the statute it will at once be recognized is simply in affirmance of the common law. In the above case the Georgia Supreme Court adjudged the following: "The rule of extraordinary diligence imposed upon common carriers by Sec. 2066 of the Code required the exercise of that degree of diligence to avoid unduly exposing goods to injury or destruction by an unforeseen act of God, such as an extraordinary flood or freshet, and also to protect and preserve the goods after the peril has become apparent. And generally, in order

for the carrier to avail himself of the act of God as an excuse, the burden of proof is upon him to establish not only the act of God ultimately occasioned the loss, but that his own negligence did not contribute thereto. For in cases of loss the presumption of law is against him." It was also adjudged in that case that: "After it is shown by dates of shipment that the goods had time to arrive and be delivered to the consignee before the flood occurred, the burden of showing what part of the goods, if any, did not arrive within that time is upon the carrier, and then the burden is upon the consignee to show the damage done to those which did arrive and the amount thereof, in order to recover on the ground of negligence in not giving notice of arrival or in not delivering on application."

It was also adjudged in that case that "As to goods which arrived too late to admit of giving the usual notice to consignees before the flood occurred, the carrier was bound to the exercise of extraordinary diligence in protecting them from damage by the flood whilst they were in his cars or his warehouse." It was also adjudged as applicable to such cases, where goods are overtaken by a flood, that "The measure of extraordinary diligence is that extreme care and caution which very prudent and thoughtful persons use in securing and preserving their own property, and that the acts and efforts constituting that diligence under all the circumstances of the case were for determination by the jury." It was also adjudged in that case that *"Precautions for the protection of property which would have been available as against any previous flood of which the carrier, a railroad company, had knowledge, would not necessarily fill the measure of extraordinary diligence, inasmuch as history or tradition might make it incumbent on the carrier to have more knowledge than that actually possessed, and that*

in such matters it might be just to treat the means of knowledge as equivalent to actual notice." The court in its opinion in that case recognized the difference between the extraordinary diligence required by the above statute in Georgia and the ordinary diligence required by the common law. However, what the court says in its opinion in that case about a liability where there is concurring negligence on the part of the carrier, applies as well to cases arising where the common law rule obtains as to cases arising under statutes like that of Georgia under consideration in that case. In its opinion commencing at page 812 the court there says: "We think moreover that this is where the burden ought to rest, for in its nature the defense of loss by the act of God involves a due accounting by the carrier for his own diligence so as to make it appear that the loss was occasioned by the act of God solely, unmixed with contributory negligence on the part of the carrier. *Doubtless where the carrier is in no previous default and the Providential act is so sudden and of such a nature as to leave no interval of time within which preventive measures against its effects could be taken, the mere proof of the act alone and of the consequent loss would establish the defense. This would be reasonable. But where the circumstances make a plain case for the exercise of some diligence and time for its exercise intervenes after the peril has become apparent, the burden of showing that the requisite diligence was exercised ought to rest upon the carrier.* The inquiry relates to his conduct, and he, his servants and agents, must know what that conduct was, and they of all persons have the best means, and not infrequently the only means, of proving it." Again, at page 814, in its opinion in that case the court said: "It came out in evidence that a part of the goods embraced in this action and which were injured by the flood, arrived at the company's

warehouse in time to have been received by the consignee and removed before the freshet occurred, and that there was not only an omission to give the notice of arrival customary in the business, but probably that these goods, or some of them, were detained by the carrier after they had been applied for by a drayman in behalf of the consignee. So far as these packages of goods were concerned the carrier failed in diligence and thus unduly exposed the goods to loss, before it was known or could be known that they had been put in peril by the particular act of God which subsequently affected them to the owner's damage." In that case the court, as is thus seen, affirmed a liability against the carrier because of the want of proper care on the part of the carrier in advance of the flood, and even in advance of the knowledge of the carrier that a flood was about to come. In that case as to some of the goods, they were not unduly delayed on the way and did not arrive until it was too late to give notice to the consignee before the freshet occurred, and as to these goods the court held that the carrier was bound to exercise diligence in protecting those goods from damage by the flood whilst they were in his cars or in his warehouse. Upon the branch of the case as to the existence of the danger, the question whether in that case the carrier exercised proper care to save the goods after the flood was on, the Supreme Court said: "The question for the jury was whether the company did as much as it could or ought to have done under the rule of dilligence to which it was subject and under all the circumstances which surrounded it." The court in its opinion in that case clearly recognized that it was the duty of the carrier to exercise either ordinary diligence under the common law or extraordinary diligence under the statute, to save the goods after the flood was on, and the court also regarded the question whether the carrier did exer-

cise diligence as a question for the jury. At the conclusion of the opinion the court made the following observation, namely: *"We agree with the trial court that the precautions for the protection of the property which would have been available against any previous flood of which the company had knowledge would not necessarily fill the measure of extraordinary diligence. This flood was in the year* 1888, *and there had been a higher one in the year* 1840. *History or tradition might have made it incumbent on the company to have some knowledge or information as to that instance of high water. Many persons still living would be likely to know of it and it might or might not be just to treat as against the railroad company its means of knowledge as actual notice. The jury would be apt to deal rightly with such a question."*

In the case of *Merritt* v. *Earle,* 29 N. Y., l. c., 116 F, in which an elaborate opinion was delivered on this subject, the court said: "The force of inevitable accident goes a step further and applies to ocurrences which no foresight or precaution of the carrier could prevent, but even this is not identical in meaning with the 'act of God.' That is an expression which excludes all human agency. It signifies the direct act of a Providential cause, for in a wider sense everything is an act of God, since nothing happens but by His permision." The learned judge proceeds to review the authorities, English and American, and concludes as follows: "It is a corrollary from these principles and the cases in which they are found that if the act of God is to excuse the carrier, it must be not only the sole, but the immediate, and not the remote cause of the loss." And in that case it was adjudged that if either the negligence of the carrier, or the intervening act emanating from any human source, contributed with the act of God to cause the injury complained of, the defendant is not excused by the act of

God, but is liable by reason and force of its general liabilty as a carrier. In the case at bar the defendant as a carrier is undoubtedly liable to plaintiffs for the loss and injury of these cattle, if the defendant is not excused by the act of God as the sole cause of the injury complained of; and if either the negligence of the defendant or any other action emanating from a human source contributed with the act of God to cause the loss and injury to plaintiffs, the defendant is still liable.

The same principle was recognized by the court in the case of *Michaels* v. *R. R. Co.*, 30 N. Y., 564, l. c., 570. In that case the court said: "This was in substance the case disclosed and the question recurs, whether the judge erred in holding the defendants liable. In other words, whether the defendants as carriers brought themselves within one of the two exceptions to their legal liability. What is precisely meant by the expression, act of God, as used in the case of carriers, has undergone discussion, but it is agreed that the notion of that exception is, those losses and injuries occasioned exclusively by natural causes such as could not be prevented by human care, skill and foresight. All the cases agree in requiring the entire exclusion of human agency from the cause of injury or loss. If the loss or injury happened in any way through the agency of man, it cannot be considered the act of God. Nor even if the act or negligence of man contributes to bring or leave the goods of the carrier under the operation of natural causes that work their injury, is he excused. In short, to excuse the carrier the 'Act of God' or *vis divina* must be the sole and immediate cause of the injury. If there be any cooperation of man or any admixture of human means, the injury is not in a legal sense the act of God." And after using this language the court cites, in support of the above propositions, many authorities.

See also the learned remarks of Cowan, J., in *McArthur* v. *Sears*, 21 Wendell, 190, l. c., 197.

The above case of *Michaels* v. *R. R. Co.* is approvingly cited by the United States Supreme Court in *Constable* v. *Steamship Co.*, 154 U. S., 66.

In the case of *Bibb Broom Corn Co.* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 102 N. W. Rep., 709, which was decided by the Supreme Court of Minnesota on Feb. 24, 1905, the identical flood of May, 1903, which is involved in the cases at bar was there considered by the court. On the same facts which were brought out in that case, so far as the flood was concerned, which are involved in the cases at bar, the Minnesota Supreme Court adjudged the following propositions: "(1) It is the duty of a common carrier to whom goods are delivered for transportation to forward them promptly and without unreasonable delay to their destination; (2) if he fails so to do and negligently and carelessly delays the shipment and the goods are overtaken in transit and damaged by an act of God which would not have caused the damage had there been no delay, he is liable, even though the act of God could not reasonably have been anticipated. The negligent and unreasonable delay is such proximate or concurring cause as renders the carrier liable." The opinion is exhaustive and contains the citation of many authorities, English and American. The decision in that case is decisive of these cases at bar now before Your Honors. In that case the trial court instructed the jury in part that if the corn was destroyed by an act of God unaccompanied by the concurrent negligence of the defendant, plaintiff could not recover, but in effect left the jury to say whether the delay in forwarding the car was negligence and whether such negligence concurred in causing the damage. This instruction was approved by the Minnesota Supreme Court and

the judgment of the trial court was affirmed. The rule applicable to this class of cases is thus stated by the court in its opinion in that case: "As a general rule applicable to all cases of negligence, if damage is caused by the concurrent force of defendant's negligence and some other cause for which he is not responsible, including an act of God, he is nevertheless liable, if his negligence is one of the proximate causes of the injury complained of, even though, under the particular circumstances, he was not bound to anticipate the interference of the intervening force which concurred with his own. * * * The authorities are at variance insofar as negligent delay is concerned, only in cases involving property not perishable. The principle in the case at bar was of that character. The property would not have been damaged but for the flood that submerged the car while in the yards at Kansas City. Neither would it have been damaged had defendant forwarded the car to Minneapolis promptly and without unreasonable delay, as it was required by law to do. So the question is, was the negligent delay of defendant in forwarding the car one of the proximate causes of the damage to the corn, or did such delay concur with the flood in causing the damage?" The court then proceeds to an examination and consideration of the authorities bearing on the question and then proceeds in its opinion as follows: "We have examined the authorities holding the opposite of this doctrine and while the courts adhering to the same are of eminent standing we have no difficulty in adopting the view in the cases above cited. The rule which permits a carrier to excuse his negligence by an act of God overtaking him while thus in fault, seems to us unsound or as based on too strict an application of the rule of proximate cause. It is the duty of a common carrier, to whom goods are delivered for transportation, promptly and without unreasonable delay

to forward them to their destination, and such was defendant's duty in the case at bar. This it failed to do, and its negligence in this respect is not seriously controverted. The car arrived at defendant's yards in Kansas City on the 23rd of May and was permitted to remain there without proper effort to forward it until it was overtaken by the flood. It could have been moved from defendant's yards on any day after its arrival, prior to the 29th of May, and had this been done the corn would not have been damaged. If defendant had acted as required by the terms of its contract and as enjoined by law, the car would have been forwarded and would have arrived at its destination prior to the flood. That defendant's neglect concurred and mingled with the act of God seems the only reasonable conclusion the facts will warrant, and we feel safe in applying the general rule that an act of God is not in such cases a defense. Every reason in equity and justice relives a carrier from the performance of his contract and from liability to injuries to property in his custody for transportation, resulting exclusively from the act of God or other inevitable accident or cause over which he has no control and could not reasonably anticipate or guard against. But reasons of that nature lose their force and persuasive powers when applied to a carrier who violates his contract and by his unreasonable delay and procrastination is overtaken by an overpowering cause, even though of a nature not reasonably to be anticipated or foreseen. If but for his negligence the loss would not have occurred, no sound reason will excuse him, and he should not be relieved by an application of the abstract principles of the law of proximate cause. No wrongdoer should be allowed to apportion or qualify his own wrong, and if a loss occurs while his wrongful act is in operation and force and which is attributable thereto, he should be held liable. *Davis* v. *Garrett*, 6 Bing., 716."

In the case of *Cobb* v. *Ry.*, 149 Mo. Rep., 609, l. c., 628, the court said: "And the fact, if it was one, that the storm had been unprecedented, affords defendant no excuse, because if a hard rain storm would sweep bents *a fortiori,* would one more severe? And the evidence unmistakably shows that had stone piers been used, defendant would have given no cause for the present litigation. *The unusual severity of the storm in this instance, instead of furnishing an excuse to defendant, should rather have struck the spur of vigilance into the flank of its apprehension.*"

In the case of *Davis* v. *R. R. Co.,* 66 Vt., 297, l. c., 298, 29 Atl. Rep., 313, l .c., 315, the Supreme Court of Vermont in 1894 delivered an opinion in which the following langauge is used: "But it is contended that the delay or negligence of the defendant in not removing the grain as speedily as the county court has found that it ought to have done renders the defendant liable. It is evident that the fire was the immediate, proximate cause of the destruction and loss of the grain. If the fire had not occurred, or if that cause is eliminated, the grain would not have been lost. The *causa causans* was the fire. The concomitant incident was the delay by the defendant in removing it from the elevator. But that delay would not have destroyed the grain, and caused its loss, if the fire had not intervened. It is generally held that a common carrier is liable on the ground of negligence only when that negligence is the proximate cause of the loss. On this subject, and on what is the proximate and what the remote cause, these authorities are helpful: *Bohen* v. *City of Waseca,* 32 Minn., 176, 19 N. W., 730, 50 Am. Rep., 564, and note; *West* v. *Ward,* 77 Iowa, 323, 42 N. W., 309, 14 Am. St. Rep., 284, and note; *White* v. *Conly,* 14 Lea., 51, 52 Am. Rep., 154, and note; *Haverly* v. *Railroad Co.,* 135 Pa. St., 50, 19 Atl., 1013, 20 Am.

St. Rep., 848, and note; *Perley* v. *Railroad Co.*, 98 Mass., 414, 96 Am. Dec., 645, and note. But courts differ in holding the carrier liable when his delay is the remote cause of the loss, and a proximate cause exists therefor, for which he is not liable. Courts of last resort, holding the carrier liable in such cases, are those of New York, followed by those of Missouri and Illinois. Holding that the carrier is not liable for such remote cause, are the courts of the United States, Massachusetts, Pennsylvania, Ohio, Michigan, West Virginia and Iowa. The cases of these states, pro and con, can be found collected in a note to *Norris* v. *Railway Co.*, 23 Fla., 182, 1 South 475, 11 Am. St. Rep., 355. To the last named class, apparently, should be added the courts of Nebraska and of Maine. *McClary* v. *Railroad Co.*, 3 Neb., 44; *O'Brien* v. *McGlinchy*, 68 Me., 557. *In some of the cases cited, holding the carrier liable, another element existed, in addition to the delay of the carrier in moving the goods to their destination, to-wit, the exposure of the property to the action of the elements, which was observable to the carrier, like freezing, or the want of food and care when the property consisted of live animals. When the property is of a kind liable to injury or destruction by such exposure, whether moving the property with due dispatch, or delaying so to move it, the carrier is under a duty to use common prudence to protect the property from dangers which are known to him to exist, and which have come expectedly or unexpectedly; and, if the danger came without his fault, he may charge for the extra care. Beckwith* v. *Frisbie*, 32 Vt., 559. *Some of the cases holding the carrier for delay might have been properly decided against him because, knowing the danger to which the property was exposed, he did not exercise the diligence and care of a prudent bailee to protect it."*

In this case Messrs. Hurley and Sharp, who were

the general superintendents of defendant, seemed to have thought they owed a duty to remove the 1,400 cars of dead freight from Argentine on May 30th, but that they owed no duty to care for plaintiffs' live stock.

In the case of *R. R. Co.* v. *Curtiss,* 80 Ill., 324, the Illinois Supreme Court held the following: "If fruit trees and shrubbery are destroyed by the cold in the hands of an intermediate carrier by reason of negligence or unreasonable delay, or if by such delay in transportation or in delivering to the next carrier in the line the latter cannot by reasonable efforts transport and deliver before they are destroyed by cold weather, the former carrier will be liable for the loss." It was also held in that case that: "Where fruit and ornamental trees shipped were destroyed by frost before reahing their destination, and this was caused by delay of transportation to Chicago, where they were to pass into the hands of another line, the fact that the company's buildings in Chicago were destroyed by fire will not furnish a sufficient excuse for the delay *where it appears that other shipments made afterwards went through in time and were delivered to the other line.*" In speaking of the duty of the carrier in that case the court in its opinion delivered by Judge Walker said: "The cold weather was approaching and the hazard of delay was increasing and it required, considering the nature of the freight and its liability to injury from frost, that all reasonable efforts should have been made to get them in the hands of the next carrier in the line before winter should set in or the weather become severely cold. Failing to do so, appellants were liable for the neglect."

In the case at bar the first train load of cattle of the Empire State Cattle Company was hauled through from Strong City to South Dakota on time, and if the same care had been used by defendant as to the second train

load in moving it homeward without delay from Strong City the loss would have been prevented.

In the case of *Wald* v. *R. R. Co.*, 162 Ill., 545, the Supreme Court of Illinois held the following: "A loss or injury is due to the act of God where it is occasioned exclusively by natural causes, such as could not be prevented by human care, skill and foresight. A common carrier is not exempt from liability for a loss occasioned by an act of God if the carrier has been guilty of any previous negligence which brings the property in contact with a destructive force or unnecessarily exposes it thereto. A carrier is responsible where property committed to it is by its negligence brought under the operation of natural causes that work its destruction or is exposed to such cause of loss. Unnecessary delay of a carrier which subjects the goods in its possession to a loss by an act of God, which they would not otherwise have met with, is of itself such negligence as will make the carrier liable for the loss. A carrier which without sufficient reason fails to ship the trunk of the passenger upon the limited train taken by such passenger, is liable for its destruction by a flood which comes upon the later train upon which it is shipped, though such flood is in itself an act of God." It was further held in that case that "it is a question of fact for the jury whether or not a railroad company is guilty of negligence in not sending a passenger's baggage by the train on which he travels and having it so carried throughout the journey." In that case the plaintiff took passage from Cincinnati over the defendant railway company to New York City on a limited express train. The plaintiff had his trunk checked from Cincinnati to New York. The railway company neglected to ship plaintiff's trunk by the train on which he took passage, as the company could and should have done, but the trunk went forward on a later train, which

later train was caught in the Johnstown, Pa., flood, where appellant's baggage was lost. In the opinion in that case, which is exhaustive and contains the citation of many authorities, there is a full consideration of the subject of proximate cause in these cases, and the rule which has been generally recognized by the courts (except possibly the trial court in the case at bar), that if there is concurring negligence on the part of the carrier, the fact that the damage was caused by an act of God is not a defense.

In the case of *Blodgett* v. *Abbott*, 72 Wis., 516, 7 Am. St. Rep., 873, the court adjudged that the defendant carrier was not excusable because it thought the next connecting carrier might have trouble in the continued transit of the goods.

According to that authority the fact that defendant thought while plaintiffs' cattle were at Strong City that they might not be carried by the connecting carrier beyond Atchison was no excuse for the delay. Indeed the evidence in this case is undisputed that if defendant had moved forward this train load of cattle the same as plaintiffs' other train load it would have gone through the same to the destination of both.

In the case of *Nelson* v. *Ry. Co.*, 72 Pac. Rep., 643. l. c., 651, decided by the Supreme Court of Montana in 1903, it was held that a common carrier receiving property for transportation, with knowledge of the existence of an obstruction on its route, and without informing the shipper, cannot offer the obstruction as an excuse for not making a prompt delivery thereof, though the obstruction is the act of God, and it is bound to take notice of the signs of approaching danger liable to create obstructions, if any are known to it. In the opinion of the court in that case the court said: "Another instruction given is as follows: 'The court further instructs you that if you

find from the evidence that an obstruction of the defendant's road by a snow blockade or otherwise existed at any point at the time these sheep were loaded, which would interfere with the prompt and safe carrying and delivery of these sheep, and which was known to the defendant, and the sheep were accepted by the defendant for shipment without informing the plaintiff of the state of affairs, the defendant cannot offer the obstruction as an excuse for failure to deliver promptly, even though the obstruction was the act of God. Having undertaken to take the shipment with full knowledge of the facts, its liability as a common carrier attached. It was bound to take notice of the signs of approaching danger if any were known to it, and, if the danger was of such a character as reasonably to awaken aprehension at a time when the facilities and means of escape from danger were within their control, they were bound to use such means for the safety of the property intrusted to their care.' The appellant complains of this instruction for the reasons (1) there is no evidence to base it upon; (2) that it is an erroneous statement of the law. The record contains evidence as to the prevalence of a storm at the time this shipment was made; that the probability of obstruction was discussed, defendant's witnesses testifying that they informed plaintiff at the time of shipment that the worst blizzard ever known was prevailing in North Dakota along the line of defendant's road. The receipt of this information was denied by plaintiff, and the question as to the existence and severity of the storm and the dangers attendant upon the shipment became and was one of the issues in the case. As to the second objection made by defendant to this instruction, we can only say that we find no error, but believe the same to state correctly the law as applicable to this case. The general rule governing this matter is expressed in *La-*

mont v. *Nashville R. R. Co.*, 9 Heisk. (Tenn.) 58, in which the court says: *"The company were bound to take notice of the signs of approaching danger, and, if of such character as reasonably to awaken apprehension at a time when the facilities and means of escape from the danger were within their control, they were bound to use such means for the safety of the property intrusted to their care.'* Further sustaining this general proposition of law, we cite the following authorities: *Fox* v. *B. & M. R. R. Co.*, 148 Mass., 220, 19 N. E. 222, 1 L. R. A., 702; *Corbett* v. *St. Paul, M. & O. R. R. Co.*, 63 Wis., 82, 56 N. W., 327; Hewett v. Chicago Ry. Co., 63 Iowa, 611, 19 N. W., 790, 5 Am. & Eng. Enc. Law (2d Ed.), 255; *Express Co.* v. *Jackson*, 92 Tenn., 326, 21 S. W., 666."

In this case we submit that General Superintendents Hurley and Sharp had no right on May 30 to speculate as to how high the then existing and unprecedented and continually rising flood might reach, or guess or take chances as to the exact number of feet up to which it might go. This is also true as to conditions Friday, when the cattle were deviated from Emporia.

In the case of *Steamboat Co.* v. *Tiers*, 24 N. J. Law Rep., 697, the Court held: A common carrier is not excused from his liability when the loss is occasioned by the Act of God, unless the Act of God is the proximiate cause of the injury, nor where the negligence of himself or any other person concurs with the Act of God in producing the loss. That a severe storm produced an unusually low tide and thereby caused the carrier's barge to strike against a timber projecting from a wharf, so low as in ordinary tides to be no cause of injury, will not excuse the carrier from the loss of the goods occasioned by the timber piercing the vessel. It was further held in that case that the doctrine that where

both parties are guilty of negligence there can be no recovery, does not apply to the owner of goods delivering them to a carrier during a storm in which it may be difficult for the carrier to protect them. If the carrier consents to receive them he is liable for all injury after delivery. The opinions in this case contain the citation of many authorities. In the opinion at p. 700, the Court says: "Admitting that the loss in this case was occasioned not by negligence in leaving the barge in a situation where she was liable to strike against the bulkhead, instead of securing her better, but that in point of fact the loss was occasioned by the low tide bringing her in contact with a timber projecting a foot or more in the bulkhead, and that that concurrence of a low tide produced by a violent storm, itself strictly an act of God, and the projecting timber which was left to project by the agency of man, was it a loss by the act of God, for which the carrier is not responsible? I am clearly of the opinion it was not. The immediate or proximate cause of the loss was the projecting timber, and defendant strenuously insists that it was not the mere influence of the storm casting the barge against the bulkhead which produced the injury, and this they are driven to do in the hope thus to escape the consequences of their negligence in allowing her to remain unnecessarily in a position where this might have happened. Admitting this negligence, they say it did not occasion the injury. Had the bulkhead been free from defect, as they supposed, no injury would have occurred. The remote cause of the loss was undoubtedly the storm, but had there been no projecting timber their argument in that case would have been inefficient as that the real producing and proximate cause was the projecting timber. It is the duty of carriers to provide good and sufficient docks, boats and other implements necessary and proper for their

business and although these instruments need not be absolutely perfect they must be free from defects, seen or unseen. If defects do in point of fact exist, the carriers are not excused, even if it be shown that they have exercised extraordinary diligence to prevent them. In the case of *Backhouse* v. *Snead,* 1 *Murphy* N. C. R., 173, it was held that where the carrier hired his vessel to be repaired by a skillful workman, who made a rudder apparently sound but internally rotten and the loss happened by reason of its breaking, he was responsible, though he was ignorant of the defects. This decision was in accordance with the general principle which holds the carrier responsible for every loss produced by an accident not coming within the definition of an act of God, as for a loss occasioned by a fire which happened without any negligence on his part or by robbers or by the misconduct or negligence of third parties; the question in such cases is not whether there has been any degree of negligence on the part of the carrier, but whether he has shown that the proximate cause of the loss was an act of God or of public enemies. Against all other causes of loss he undertakes to insure, and if the accident which occasioned it was not an act of God or of enemies but was wholly without his fault, it was at all events his misfortune and not the misfortune of the owner. The argument for the defendants in this case is that inasmuch as if there had not been an unusually low tide, produced by a violent storm of wind, the barge would not have struck the timber; therefore, the loss must be attributed to the storm. But if that argument was sound, it would follow that if an unseaworthy vessel should founder in a storm, the fact that she might have gone safe if the weather had remained fair would excuse the carrier. This is not pretended to be the law. If a vessel be in fact unfit for

her business, a loss arising from a storm is presumed to have been occasioned by the defect of the vessel, because it is impossible to say how far the defect contributed to the loss. Upon the like principle if the carrier's dock be imperfect a loss arising by the influence of a storm acting upon the imperfection and which would not have happened in the absence of either cause, must be attributed to the imperfection. The loss is not by an act of God alone. It is produced partly by an act for which the carrier is responsible. Had there been no storm, but had the dock itself given way and sunk the vessel, or had a projecting timber before unnoticed or believed not to be dangerous occasioned the injury, since no act that could be called the act of God had intervened, it is undeniable that the carriers would be liable. In this case an act of God did intervene and was instrumental in producing the loss, but it was not the sole or proximate cause of the loss. And defendants themselves insist and assume in the charge they desire that the storm itself did not do the injury. Had not another instrument concurred which proceeded from the active or passive agency of man and for which man is responsible, there would have been no loss.'

In the case of *R. R. Co.* v. *David,* 6 Heisk. 261, it was held that "when goods in the hands of a common carrier are placed in jeopardy by some *vis major* he is bound to use actively and energetically such means to save them as prudent and skillful men engaged in that business might fairly be expected to use under like circumstances. It is error therefore to charge the jury that in such case the carrier is bound to use all the diligence which human sagacity can suggest." The Court in that case, in speaking of the case of *R. R. Co.* v. *Reeves,* says: "The sounder rule is thus given by the Supreme Court of the United States, citing from 20

Pa. Rep., 171, in the case of *R. R. Co.* v. *Reeves*, 10 Wallace 191, that when carriers discover themselves in peril by inevitable accident the law requires of them ordinary care, skill and foresight which is the common prudence which men of business and heads of families usually exhibit in matters that are interesting to them. While the rule is not very clearly expressed or defined by the above statement of it, nor very distinctly illustrated so far as shown by the reference to the course of heads of families in matters interesting to them, yet the principle intended to be stated is the true one,—that is that in case of accident or an emergency such as is presented in this case, a railroad company is bound to use such means as would suggest themselves to and be within the knowledge and capacity of well-informed and competent business men in such positions and such diligence as prudent, skillful men engaged in that kind of business might fairly be expected to use under like circumstances, and that this diligence and these means should be actively used to protect and secure the property confided to their care. In other words, there should be no failure to use actively and energetically all the known and usual means which may fairly be expected to be found within the knowledge of men of average qualifications engaged in a responsible business of this kind where large amounts of property of the citizens passing through their hands and are entrusted to their care."

In the case of *McGraw* v. *R. R. Co.*, 18 W. Va., 361, it was held that if the goods transported were frozen, it exempted the carried from liability provided he had been guilty of no previous negligence and misconduct by which such loss or damage may have been occasioned. In the opinion in that case at p. 365 the Court says: "But whenever the common carrier is

exempt from liability, either because of an act of God *or because of the nature and inherent character of the property and its liability to loss or damage, he must be free from any previous negligence and misconduct by which that damage may have been occasioned, for though the immediate or proximate cause of a loss in any given instance may have been what is termed an act of God, or from the nature and inherent character of the property, yet if the carrier unnecessarily exposed the propety to such accident by any culpable act or omission of his own he is not excused."*

In the case of *Smith* v. *Ry. Co.*, 91 Ala., 455, l. c., 456, the court in its opinion said: "An act "of God is a cause which no human prudence or power "could prevent or avert. While it is true that no human "agency can prevent or stay an act of God, the act "itself being that of Omnipotence and irresistible, it is "frequently the case that the results or natural conse- "quences of an act of God, by the exercise of reasonable "foresight and prudence, may be foreseen and guarded "against. When this can be done by the exercise of "reasonable diligence and prudence, a failure to do so "would be negligence and subject the party on whom "this duty devolved to damages, although the original "cause was an act of God. *Notice of an extraordinary "rise at the head of a river might be sufficient to parties "engaged in business lower down to expect a proportion- "ate rise and to prepare for it, dependent more or less on "the suddenness of the rise and the time after notice and "before the rising water reached the place where the "injury occurred."*

See also *Coosa River Steamboat Co.* v. *Barclay*, 30 Ala. 120, l. c. 127.

In this case defendant was bound to take notice from flood conditions in the Kaw river at Topeka, where de-

fendant had its chief offices, as those conditions existed on Friday, May 30, when these cattle were forwarded from Strong City, that it was positively and unqualifiedly dangerous to attempt to take them across the Kaw river at Kansas City.

In the case of *Nugent* v. *Smith,* 1 C. P. Div., 19 and 423, l. c., 436, the Court in an exhaustive opinion delivered by Cockburn, C. J., said: "The carrier is bound to do his utmost to protect goods committed to his charge from loss or damage, and if he fails herein he becomes liable from the nature of his contract. In the one case he can protect the goods by proper care. In the other it is beyond his power to do so. If by his default in omitting to take the necessary care, loss or damage ensues, he remains responsible, though the so-called act of God may have been the immediate cause of the mischief. If the ship is unseaworthy and hence perishes from the storm which it otherwise would have weathered, if the carrier by undue deviation or delay exposes himself to the danger which he otherwise would have avoided, or if by his rashness he unnecessarily encounters it, as by putting to sea in a raging storm, the loss cannot be said to be due to the act of God alone, and the carrier cannot have the benefit of the exception."

In Vol. 1, Am. & Eng. Enc. Law (2d Ed.), 595, the author uses the following language: "Where the negligence of the carrier concurs with an act of God in producing a loss, the carrier is not exempted from liability by showing that the immediate cause of the damage was the act of God; or, as it has been expressed, where the loss is caused by the act of God, if the negligence of the carrier mingles with it as an active and co-operative cause, he is still responsible."

In Vol. 5, Am. & Eng. Law (2d Ed.), 234,

the author uses the following language: "No accident or casualty which might have been prevented by the exercise of ordinary care and forethought on the part of the carrier and by the use of known means not requiring any extraordinay diligence, can be attributed to inevitable accident or act of God as a cause, and the carrier cannot escape liability therefor."

In Hutchison on Carriers, Sec. 181, the rule is stated thus: "And whenever the carrier is placed in a situation in which it becomes necessary for him to exercise his skill or judgment, no matter what may be the circumstances of danger or difficulty, he takes the risk of the proper exercise, and if there be a way or means of escape, *a carrier by losing his presence of mind* or by mistaking one object for another is thereby misled or shows a want of the necessary skill and judgment whereby a loss occurs, he is responsible." See also Hutchinson on Carriers, Secs. 185 to 192. In Hutchinson on Carriers, Sec. 186, it is said: *"And it may be stated generally that whenever he goes to meet danger in spite of the warning of the elements or with a blind confidence that he will be able to encounter it in safety, whether it be upon sea or on the land, he brings the loss upon himself and it will not avail him that the immediate cause of it was the Act of God."*

In this case the telegrams read in evidence taken in connection with the evidence of Mr. Douthitt show that defendant's officers and agents wholly lost their presence of mind when they commenced the repeated acts of loading and unloading of the cattle at Strong City, and that they did not regain their presence of mind until the flood subsided.

In Hutchinson on Carriers, Secs. 187 and 188, the cases of the *Charleston S. B. Co.* v. *Bason,* 1 Harper, 262, and *Campbell* v. *Morse,* 2 Harper,

468, are cited by that author with approval. In the first case, where goods were laden upon a steamboat which grounded from the reflux of the tide, in consequence of which she fell over and the water rose into her cabin and injured goods belonging to the plaintiff, the owners of the vessel were held liable for the loss because it was held that the master of the vessel was guilty of negligence in not selecting a proper place for the grounding of the vessel or in not removing the goods when he saw that the coming of the water into the cabin was inevitable under the circumstances in which the vessel was placed. He was therefore liable for two reasons: (1) because of his negligence in bringing the vessel into the improper place where the danger should have been seen, and (2) because when the grounding had occurred he did not use the proper diligence to save the goods. And in the other case, of *Campbell* v. *Morse,* the carrier undertook to cross a stream between sundown and dark, immediately after a rain, and the wheels of his wagon stuck fast and he was unable to extricate it before the stream rose so as to submerge the body of his wagon and damage the goods. He relied for his defense upon the nature and circumstances of the misfortune as an excuse, although it was proven that the rise was more sudden and higher *than any that had been known to take place in the stream for forty years.* The Court held that it was manifest that had he gone through the ford without being stopped the accident would not have occurred. In attempting to cross the stream under the circumstances, he took upon himself the risk of its sudden rise and the consequences.

In this case defendant's officers and agents had no right to estimate or guess that this flood would be of the same exact height as the flood of 1881, and that it would not go higher.

In Vol. 6, Cyc. Law & Proc., 377, it is said: "The

term act of God used to express a cause of loss or damage, for the consequences of which the carrier will not be liable, means some casualty not due to human agency. The terms inevitable accident and unavoidable accident are sometimes used as synonymous with the act of God, but they lack the suggestion that the loss is due to other than human agency and therefore their use is not satisfactory. Indeed, it has been said that act of God is distinguishable from inevitable accident. In the civil law the carrier is said to be excused by *vis major* and also by *casus fortuitus,* but the rule of carriers' liability by the civil law is the same as by the common law, and these terms are not equivalent to act of God. To constitute act of God the casualty must be not only the direct result of natural causes, but one which is in no way contributed to by human agency."

Again, at p. 384, the same author says: "It is clear from what has been already said that if the carrier might, by reasonable care or foresight, have avoided loss by act of God or other excepted cause, he will be liable. The duty also rests upon him as far as possible to avoid or lessen the damage resulting from such cause, and negligence in not doing so will render him liable."

In the case *Strouss* v. *Ry. Co.,* 17 Fed. Rep., 209, l. c., 212, the Court in its charge to the jury said: "You will see, then, from the statements of these general principles, that the important question for you to settle from the evidence is whether, after these trunks were receivd by the baggage master and checked, the flood came so suddenly that, under the circumstances, the injury could not have reasonably been prevented by the defendant, or its agents in charge of the trunks, by the use of all possible means. If it could have been done with the exercise of reasonable and proper and all possible means that could be exercised and used by these officers, then the defend-

ant was bound to place the trunks in a place of safety and prevent damage to the goods in the trunks. If, under the circumstances, it could not have been so reasonably and possibly done—with the surroundings of the parties at that time, from the impending flood—the sudden character of the flood—if they could not take care of the gooods under these circumstances, then you will be justifiable in saying that they were injured by the act of God; but the theory of that is that the company must use every possible means to prevent the flood from damaging the goods. The general rule is that if goods in the hands of a common carrier are damaged by the public enemy—as in case of the army destroying goods at a depot in the late war—then the law says the common carrier is not to be held responsible for the loss of the goods. And so of sudden floods and cyclones, that render it beyond the power of the company to take care of the goods and protect them. And this question narrows itself down to the fact as to what care this defendant gave, under the circumstances, to these goods that night, in order to save them from injury, and what it did do. If, by the exercise of the means within its control, with all the surrounding as the depot was fixed (the plaintiffs put their trunks there in the depot as it was constructed), and you could not expect the railroad company to make any extraordinary provisions such as were only required on extraordinary occasions, but it would be required to use all the machinery it had around it to make this baggage secure—its officers did all that was possible to be done under the circumstances, then it is not liable; if they did not do that, then it is liable to this plaintiff for the damages resulting from its failure to carry these goods safely to Napoleon, and is only to be excused from the performance of this contract by the happening of an act of Providence that they could not avoid."

In the case of *Caldwell v. Southern Exp. Co.*, 4 Fed. Cas. No. 2303, p. 1083, decided by the Circuit Court of the U. S. for the Western District of Tenn., it was held that the carrier is liable if he negligently expose property to capture by a public enemy, in consequence of which it is captured and destroyed. In that case it was held that if the negligence of the carrier concurred with the act of the public enemy the defendant was liable.

In the case of *Tompkins* v. *The Duchess of Ulster*, 24 Fed. Cas. No. 14087a, p. 32, the District Court of the U. S. for the Southern District of New York, in an opinion delivered by Judge Betts, held "that the act of God which excuses a common carrier from liability must be the immediate and distinct result of Providential events, *suden or overwhelming in their character, which human sagacity or force could not foresee or prevent.*" In that case it appeared that a steamboat loaded in New York for Peekskill sunk in a storm in the North River. The case was one in admiralty. The libelant owners of the cargo proved by the pilot that there was fault and negligence in the management and equipment of the boat and it appeared that the boilers leaked and extinguished the fires, thus disabling the engines from working; also that an ashhole was left open below the deck. The claimants contended that the vessel and cargo were lost on account of the violence of the storm, and denied the allegations of negligence and improper equipment. The vessel was held liable by the Court for the loss of the cargo. In the opinion in that case the Court said: "In the aspect of the controversy it might be important to examine particularly this branch of the case, because the rule of law seems explicitly settled that when the loss is produced wholly by natural causes, still if there be the least degree of negligence conducing to it or it arises in any way from human actions or neglect or in combination with

such action or neglect, the carrier is not excused. *McArthur* v. *Sears*, 21 Wendell, 190. *Williams* v. *Grant*, 1 Conn., 487. * * * Yet usually the qualification attends that the accident or necessity which excuses carrier must be the immediate and distinct result of Providential events, *sudden or overwhelming in their character, which human sagacity or force could not foresee or prevent. Forward* v. *Pittard*, v *Durn.*, and E. 33, 3 Kent Comm., 217." The illustrations Chancellor Kent gives as the summary of the doctrine on this subject are that the carrier is responsible unless the loss has happened by means of lightning, earthquake or tempest.

In this case, as we have seen, the flood was no sudden affair coming like a fire or cyclone, but had been coming on for nearly a month before its climax was reached.

In the case of the *Southern Pacific Co.* v. *Schoer*, 52 C. C. A., 269, l. c. 274, 114 Fed. Rep., 466, this court adjudged that nothing less than such a fortuitous gathering of circumstances as prevents the performance of a duty and such as could not have been foreseen by the exercise of reasonable prudence or overcome by the exercise of reasonable care and diligence constitutes an act of God which will excuse the discharge of a duty." That was a case where the recovery was based upon damage sustained by the plaintiff in consequence of a collision of a train of the defendant. The railway company contended that the collision was due to an act of God. In the opinion of the Court in that case, which was delivered by Judge Sanborn, this Court used the following language: "But there was nothing in all this or in any of the evidence of the case to warrant an instruction to the jury that they might find that this collision was caused by an act of God, and nothing less than an act of God would relieve the defendant from the duty of exercising reasonable care in the operation of its trains. The foundation of the

rule that the act of God excuses the failure to discharge a duty is the maxim *Lex neminem cogit ad impossibilia. If by the use of reasonable care, prudence and diligence under the circumstances of a particular case it is possible to discharge the duty, then those circumstances do not constitute a valid excuse for the failure to perform it. Nothing less than such a fortuitous gathering of circumstances, preventing the performance of a duty, as could not have been foreseen or overcome by the exercise of reasonable prudence, care and diligence, constitutes an act of God which will excuse the discharge of the duty.'*

In the case of *Newport News Co.* v. *U. S.*, 9 C. C. A., 579, 61 Fed. Rep., 488, the Court adjudged that under the Revised Statutes of the U. S., Secs. 4386, 4388, forbidding interstate carriers of animals to confine them more than twenty-eight consecutive hours without unloading for rest, water and feed, unless prevented by storm or other accidental causes, such unloading is excused by unavoidable causes only and therefore not by an accident to a train due to negligence. The language of the act of Congress considered in that case, "unless prevented from so unloading by storm or other accidental causes," is the same, word for word, as the concluding words of the second paragraph of the contract in this case, which is recited in the opinion of the Trial Judge in his opinion in this case. In the opinion in that case of the Circuit Court of Appeals for the Sixth Circuit the following language is used: "Congress did not mean that simply because the carrier had encountered the storm, therefore he must be excused. It must appear that the storm prevented obedience. The storm could not be prevented. Its consequences may be avoided or mitigated by the exercise of diligence. If with all reasonable exertion a carrier is unable, by reason of a storm, to comply with the law, then he has been unavoidably

prevented from obeying the law. If notwithsanding the storm he could, by due care, have complied with the law, then he is at fault because his own negligence is the last link in the chain of cause and effect, and in law the proximate cause of the failure to comply with the law. Therefore, to avail himself of the excuse of storm the carrier must show not only the fact of a storm, but that with due care he was prevented as an unavoidable result of the storm from complying with the law. We may reach but one conclusion as to the meaning of Congress by the expression "other accidental causes." If the storm is no excuse unless its unavoidable effect was to prevent compliance, then it follows that no other accidental causes would be an excuse unless that cause and its effect are likewise unavoidable. The meaning of the words "other accidental causes" must be ascertained by referring to the preceding special words.

The rule *noscitur a sociis* is clearly applicable. A storm is unavoidable in the sense that it cannot be prevented. Other accidental causes must be taken to mean other unavoidable accidental causes. An effect attributable to the negligence of the appellant is not an unavoidable cause. The negligence of the carrier was the cause; the unlawful confinement and unreasonable detention but an effect of that negligence."

In the case of *Clark* v. *Barnwell*, 12 Howard, 272, l. c., 280, the U. S. Supreme Court in its opinion said: "And the main question in the case is whether or not the damage in question was occasioned by one of the perils and accidents within this clause of the bill of lading, for the masters and owners, like other common carriers, may be answerable for their acts although no actual blame is imputable to them, and unless they bring the case within the exception, in considering whether they are chargeable for a particular loss, the question is not whether the loss

happened by reason of negligence of the persons employed in the conveyance of the goods, but whether it was occasioned by any of those causes which, either according to the general rules of law or the particular stipulations of the parties, afford an excuse for the non-performance of the contract. After the damage to the goods, therefore, has been established, the burden lies upon the respondents to show that it was occasioned by one of the perils from which they were exempted by the bill of lading; but even where evidence has been thus given, bringing the particular loss or damage within one of the dangers or accidents of the navigation, it is still competent for the shippers to show that it might have been avoided by the exercise of reasonable skill and attention on the part of the persons employed in the conveyance of the goods. For then it is not deemed to be, in the sense of the law, such a loss as will exempt the carrier from liability, but rather a loss occasioned by his negligence and inattention to his duty. Hence it is that although the loss occurs by a peril of the sea, yet if it might have been avoided by skill and diligence at the time, the carrier is liable."

In the case of *Holliday* v. *Kennard*, 12 Wallace, 254, the U. S. Suprme Court, in an opinion delivered by Mr. Justice Bradley, affirmed the rule that when goods in the hands of a carrier are threatened to be destroyed or seized by a public enemy he is bound to use due diligence to prevent such destruction or seizure. It is not necessary that he should be guilty of fraud or collusion with the enemy or willful negligence to make him liable. Ordinary negligence is sufficient. In the opinion in that case Mr. Justice Bradley said: "The effect of the charge as delivered was that although a common carrier is not responsible for the destruction or loss of the goods by the act of God or a public enemy, he is nevertheless bound to

use due diligence to prevent such destruction or loss. *If his negligence or want of proper attention contributed thereto, he would be liable therefor.* * * * Surely the law requires this degree of diligence and would make the defendant liable for the want of it—that is, for ordinary ngligence. Whether such negligence was or was not proved was fairly left to the jury."

In the case of *Gleason* v. *Virginia Midland R. R. Co.*, 140 U. S., 435, l. c., 439, the U. S. Supreme Court in its opinion used the following language: "Extraordinary floods, storms of unusual violence, sudden tempests, severe frosts, great droughts, lightnings, earthquakes, sudden deaths and illnesses have been held to be acts of God, but we know of no instance in which a rain of not unusual violence and the probable results thereof in softening the superficial earth have been so considered In *Dorman* v. *Ames*, 12 Minn., 451, *it was held that a man is negligent if he fail to take precautions against such rises of high waters as are usual and ordinary and reasonably to be anticipated at certain seasons of the year, and we think the same principle applies to this case.*" The recurrence of floods in May and June annually are to be anticipated in both the Missouri and Kaw rivers. But the flood of 1903 in the Kaw River, according to the testimony of both Messrs. Connor and Jennings, was far above the average annual floods from an early time in May, 1903, and its growth was continuous and unprecedented from the start.

In the case of The Majestic, 166 U. S., 376, l. c., 386, the Supreme Court of the U. S. unanimously adjudged that the act of God which would exempt from liability a common carrier is limited to causes in which no man has any agency whatever. In the opinion of the Supreme Court in that case the following language is used: "'The act of God,' said Chancellor Kent (Vol.

2, p. 597), 'means inevitable accident without the intervention of man and public enemies,' and again (Vol. 3, p. 216) that 'perils of the sea denote natural accidents peculiar to that element which do not happen by the intervention of man nor are to be prevented by human prudence.'" And *casus fortuitus* was defined in the civil law to be *quod damno fatali contuigit cuivis diligentissimo possit contingere.* It is a loss happening in spite of all human effort and sagacity. The words "perils of the sea" may, indeed, have grown to have a broader signification than the act of God, but that is unimportant here. Shipmen, in the Court of Appeals, quotes from 1 Parsons on Shipping, 255, the definition there given of the act of God, and the reason for it, as follows: "The act of God is limited, as we conceive, *to causes in which no man has any agency whatever, because it was intended never to raise in the case of the common carrier the dangerous and difficult question whether he actually had any agency in causing the loss, for if this were possible he should be held.*"

III.

Upon that branch of the case relating to the question of deviation we submit the following authorities:

In the case of *Crosby* v. *Fitch,* 12 Conn., 410, l. c., 419, 420-423, this question of deviation was discussed and decided. In that case the goods were consigned for shipment in defendant's vessel from New York City to Norwich, Conn., and the usual course of navigation vessels in such cases was by Long Island Sound. The navigation of the sound being interrupted by ice, the vessel made the voyage south of Long Island, where a loss occurred by the goods being thrown overboard in a storm to save the vessel. The Court held that the vessel should not have commenced its voyage until the ice had disap-

peared from the sound; that there was no sufficient necessity for the deviation, and that the owners of the vessel were liable for the loss of the goods. The Court, at p. 422, places the liability on the ground of contract, holding that the usual and customary route is within the contemplation of the parties when the contract of shipment is made.

On the subject of deviation see also *Powers* v. *Davenport,* 7 Blackford, 497; *Philips* v. *Bingham,* 26 Ga., 617.

The above case of *Crosby* v. *Fitch,* 12 Conn., 410, and the cases of *Davis* v. *Garrett,* 6 Bing., 716; *Wiliams* v. *Grant,* 1 Conn., 487, and *Michaels* v. *R. R.,* 30 N. Y., 564, are approvingly cited by the U. S. Supreme Court in the case of *Constable* v. *Natl. Steamship Co.,* 154 U. S., 66.

In the case of *R. R. Co.* v. *Beck,* 125 Pa. St., 620, the Court adjudged that when a railroad company, in disregard of a shipper's instructions and of its undertaking, forwards merchandise by steamer instead of by rail, and the merchandise is lost by fire on the steamer, the carrier is responsible for the loss in an action on the contract, the question of proximate cause as in an action for negligence being immaterial. In that case the Court in its opinion says: "If the defendant company, for reasons of its own, saw fit to disregard instructions and forward the cigars by steamer instead of by rail, and a loss resulted, it is too plain for argument the defendant would be responsible for such loss. It is begging the question to say that if the cigars had been shiped by rail as directed a loss might have occurred. In such case the defendant would have incurred no responsibility."

So in *Phllips* v. *Brigham,* 26 Ga., 617, it was held that "if a common carrier deviates from the regular route and

the goods are lost it is a conversion." In the opinion in that case the Court said: "If the boat took the cotton by agreement, to carry the cotton to Savannah, and instead of going the ordinary route to Savannah went an extraordinary route, and while out of the ordinary route the cotton was lost, that was a conversion."

In this case the ordinary and usual route, according to all the evidence, for a shipment over defendant's road from Amirilla, Texas, to Atchison, Kansas, was by way of Wellington, Strong City, Emporia, Topeka and Valley Falls to Atchison, and the taking of the cattle from Emporia to Kansas City was a deviation by an extraordinary route not within the contemplation of the parties in making the shipment.

In the case of *R. R. Co.* v. *Cole,* 68 Ga., 623, it was held that "Where goods are delivered to the first of a connecting line of railroads to be shipped to a given destination by a specified route, a delivery by the first railroad to another railroad which forms a part of a different route is a breach of the contact and a conversion which renders the first road liable for the value of the goods, and if the goods be delayed by such delivery, or damage result, the first road may be held responsible therefor."

In this case the route within the contemplation of the parties, as evidenced by the endorsements on the back of the contracts of shipment and also on the way bills, was from Amirillo to Atchison over defendant's road, from Atchison to Council Bluffs over the Burlington route, and thence to Evarts, S. D., over the C., M. & S. P. Ry., and the attempt to transport the cattle over Missouri Pacific Railway by way of Kansas City was a conversion.

In the case of *Cassilay* v. *Young,* 4 B. Monroe, 265, the Appellate Court of Kentucky held that the undertaking of a carrier to deliver goods, the dangers of the river

excepted, with privileges of reshipment at a particular point, will not authorize a stoppage short of the point designated for reshipment, and if the carrier stops short of that point and the cargo be lost in a storm, the carrier will be held responsible. The vessel of the defendants which carried the plaintiff's goods in that case was sunk in a storm at Paducah. The shipment was destined to Vicksburg, Miss. The Court in its opinion in that case says: *"The storm at Paducah was undoubtedly a peril of the river or an act of God for the effects of which the carriers would not have been liable if they had encountered it in the ordinary course of their voyage and of their duty, but as it comes upon them when out of the course of their voyage and of their duty and might probably have been avoided or at least its effects greatly mitigated but for their disregard of their duty and of their contract, we are of opinion that they are liable for the loss."*

In the case of *Sager* v. *R. R. Co.*, 31 Me., 228, l. c., 238, the Court held that "a common carrier will be liable for damage to goods resulting from disobedience of the directions given by the owner and assented to by the carrier respecting the mode of conveyance."

In the case of *R. R. Co.* v. *Washburn*, 22 O. St., 324, it was held that a common carrier who undertakes to transport goods over the whole or a part of its own route and then to forward them to a designated destination beyond is bound to transmit, with their delivery to the carrier next on the route, all special instructions received by him from the consignor, and in default thereof in any material or substantive particular to stand responsible or to make good the loss to which such negligence shall have contributed. In that case a shipment was made from Cleveland, O., destined to Martinsburg, Mo. The shipment was delivered to the Cleveland, Columbus & Cin-

cinnati R. R. Co., which was to carry the goods to St. Louis and deliver them to the North Missouri R. R. Co., on whose line said point of destination, Martinsburg, was situated. The receiving company carried the goods to Columbus, and there delivered the goods to the defendant, Miami R. R. Co. The line of the defendant railroad company composed a part of the line of the initial railroad company. The goods were carried to Cincinnati and were there diverted by being delivered to the Ohio & Mississippi R. R. Co., which did not constitute any part of the line of shipment originally designated, and the goods were consigned to C. A. Scott, a commission merchant at St. Louis. On the arrival of the goods at St. Louis Scott refused to pay the freight charges, and the goods were lost in St. Loius. In its opinion in that case the Ohio Supreme Court said: "A common carrier who receives goods under an agreement to transport them over the whole or a part of its own route, and then to forward them to a destination beyond acts in the two-fold capacity of carrier and forwarder. In the latter capacity alleged negligence in which is the sole ground of controversy presented by this record, he acts as agent of the consignor and as such is bound to transmit with reasonable exactness to the next succeeding carrier the instructions of his principal. If these instructions be without restriction as to the subsequent route, intermediate consignment or mode of transit of the goods, but are in general terms to forward them to a designated destination, he will have discharged his duty as forwarding agent by accompanying their delivery in good order to the carrier of the next usual route of transit, with the like general instructions in terms sufficiently explicit and unambiguous to inform him of their ultimate destination."

In the case of *Express Co.* v. *Smith,* 33 O. St., 511, the Court there held as follows: "The carrier who un-

dertakes to carry goods over his own road is not responsible for unavoidable delays such as might be occasioned by the destruction of a railroad bridge by a flood, and if such delays occur while the goods are in transit it is thereupon the duty of the carrier to exercise his sound discretion and reasonable diligence in forwarding the goods to their destination. He is not bound to divert the goods from his own to another road over which he has no control, unless in the exercise of such discretion and diligence it appears that a change in route would have prevented the loss attendant upon delay." In that case it was contended by the plaintiff that the injury to the goods while in transit near Utica, N. Y., by reason of heavy rains, could have been avoided if the goods had been transshipped and the shipment deviated either by way of Syracuse or Buffalo, and it was contended that, therefore, it was the duty of the carrier to make such deviation. The Court, at p. 520, respecting this contention, said: "Had the plan suggested been in fact pursued and the peaches transshipped either by way of Syracuse or Buffalo, the delay which would have ensued, together with the rough jolting attendant upon the necessary cartage, would, as it seems to us, have insured their entire destruction. Thereupon the shippers might, with much force of argument, have said: *'We shipped by your route and you had no right to make a deviation. By so doing you subjected our property to unusual delays and risks not contemplated, and loss having ensued, you are responsible. You should have gotten it around the break with all speed, but if that were impossible you should have sold it to the best advantage instead of taking a caurse which must have necessarily led to its entire loss.'*"

In the case of *Brown and Haywood Co.* v. *The Pacific R. R. Co.*, 63 *Minn.*, 546, it appeared that the

defendant carrier had received the shipment of goods from the plaintiffs to be carried to a point beyond defendant's line, with directions from plaintiffs to deliver them to certain connecting carriers, to be carried to their destination. The shipper made an agreement with the last connecting carrier to have the car containing the goods stopped at two intermediate points on its line and certain portions of the goods delivered to each point, the balance to be carried to the destination to which the goods were billed by the initial carrier. The initial carrier had no knowledge of this agreement and wrongfully sent the goods by a disconnecting carrier, whose line did not reach the place of destination but did reach one of said intermediate points, to which it brought the goods and was proceeding to forward the whole of them to the place to which they were so billed, when plaintiff disclosed to it his contract to have the goods distributed to the three points, and demanded that it be complied with. Before complying with the same, this carrier compelled him then and there to pay the whole freight for the whole route and thereupon delivered him the goods destined to that point, and undertook at his own cost to carry to each of the other points the portion of goods destined to such point. In doing so one package of goods was broken and destroyed. In a suit by the shipper against the initial carrier for the loss, the Court held in that case the initial carrier became, by its wrongful act of diverting the goods from the designated route, an insurer for their safe delivery at the three places of destination, though two of those places were never disclosed to it. It was further held in that case that the transaction between the shipper and the carrier to whom the goods were wrongfully delivered did not amount to a delivery then and there to the shipper so as to relieve the initial carrier from his liability. There was a judgment in the trial court

against defendant carrier, and on an appeal that judgment was affirmed. In the opinion in the case the Court says: '"Appellant concedes that by misconducting the goods beyond the end of its own line the defendant was liable for conversion, and was therefore liable for the safe arrival of the goods at their destination, all of which is undoubtedly good law."

In the case of *Hedricks* v. *Steamship Co.,* 18 La. Ann, 353, the Court held that "where a party selects one ship in lieu of another, whereon to ship his goods, he cannot complain if they are lost, although his bill of lading was made out for that other."

In *Hastings* v. *Pepper,* 11 Pick., 41, it was held that "if a common carrier receives goods directed to be carried in a particular manner and position, he is bound to carry them in that manner and position, and if he carries them otherwise and they are lost or damaged the burden will be upon him to prove that the loss or damage was in no degree attributable to his breach of contract, but was occasioned solely by the act of God or a public enemy or the act or fault of the owner himself. In the opinion which was delivered by Chief Justice Shaw it is said: "As the carriage is a matter of contract, as the owner has a right to judge for himself what position is best adapted to carry goods of this description with safety and to direct how they shall be carried, and as the carrier has the right to fix his own rate for the carriage or to refuse altogether to take the goods with such directions, the Courts are all of the opinion that if the carrier accepts goods thus marked, he is bound to carry the goods in the manner and position required by the notice. Here it is in evidence and not denied that the box was stowed in such a manner that the marked side was not kept up and consequently the large bottle which was broken by some cause on the passage after it was stowed

and before its arrival, bore its weight on its side and not on its bottom, but it is argued that although this fact is evidence of both negligence and breach of contract, still if the loss was not the consequence of such negligence the defendant is not the more responsible on that account. This is no doubt correct, but we are clearly of the opinion that such negligence and breach of contract being proved, the defendant is bound to stand to the loss unless he can prove clearly that the loss was in no way attributable to that cause, or rather, to prove affirmatively and beyond reasonable doubt what was the cause of the loss and that such cause was not attributable in any degree to the negligent disregard of the notice on the box."

In the case of *Proctor* v. *R. R. Co.*, 105 Mass., 512, it appeared that the defendant railway company, whose road ended in Boston, received at a way-station goods addressed to St. Louis, which the defendant company agreed to convey to Boston and forward thence by the Merchants Express, which was a line of transportation from Boston to the West; but instead of delivering the goods to said Merchants Express at Boston, the defendant company forwarded the goods to New York by other carriers, who there delivered the goods to a company styled the Merchants Express & Transportation Co., which conveyed them thence to St. Louis at a cost greater than would have been the cost of their transportation thither by said Merchants Express, and the court held that the company was liable to the consignor of the goods for the difference in cost.

In the case of *Rwy. Co.* v. *Allison*, 59 Tex., 193, the court held that *"if a common carrier deviates from his route or forwards goods by different conveyances than those contemplated by his agreement, he becomes an insurer of the goods and cannot avail himself of any ex-*

emption in his behalf in the contract." In that case the company, in receiving the freight, stipulated against responsibility for damage beyond its own line, but agreed to forward the goods through to Chicago in the cars in which they were loaded, and it was held that by changing the cars after they left the road of the company it assumed the risk of safe transportation of the goods, notwithstanding the stipulation against liability for damage beyond its own line. At page 198 the court, in its opinion, says: *"The exemption from liability is, however, available only where the carrier forwards the goods consigned to him in the manner and by the route with reference to which the contract is made. If he deviates from his route or forwards the goods by different conveyances from those contemplated by his agreement, he becomes an insurer of the goods and cannot avail himself of any exceptions made in his behalf in the contract. Fatman* v. *Cincinnati R. R. Co.,* 2 Disney, 248; *Robinson* v. *Merchants Dispatch Co.,* 45 Iowa, 470. The contractor forwarded the melons in this case through from Galveston to Chicago on the cars in which they were loaded as an entirety. By changing the cars after they left appellant's road the risk of their safe transportation was assumed by its agent, the connecting line, when the change occurred, for the company, and it became liable notwithstanding the stipulation against damage beyond its own terminus. A case in point is that of *Stewart* v. *Merch nts Dispatch Co.,* 47 Ia., 229. Their goods were delivered to a transportation company at Worcester, Mass., to be taken to Muscatine, Ia., through without transfer in cars owned and controlled by the company, and the contract contained a clause of exemption against liability for loss by fire. When the goods reached Chicago they were transeferred to a warehouse and consumed by fire the same day. It was held that the com-

pany were liable for the loss notwithstanding the exemption."

In the case of *Johnson* v. *R. R. Co.*, 33 N. Y., 610, l. c., 611, the court adjudged that a common carrier in the shipment of goods is bound to obey the instructions of the shipper, and if he disregards instructions and the goods are lost, the carrier is liable for their value; that the disregard of instructions by the carrier is at his own risk. The goods sued for in that case were lost on the passage thereof to New York in a boat that was lost. The goods had been delivered to the railway company at Littlefalls, in Herkimer County, New York, to be transported by the railroad company to Albany and thence forwarded by the People's Line of steamboats to New York City. The railway company, however, did not, in accordance with the instructions, deliver the goods to the People's Line of steamboats at Albany, but delivered them to a line of towboats of another company running between Albany and New York. The court, in its opinion, says: "The defendant undertook to transport the flax to Albany and to forward it thence to New York by the People's Line of steamboats; on the refusal of that line to receive it the defendant's obligation as a carrier ceased, and if it incurred any further liability it was in the character of agent for the owner of the property. In the absence of instructions as to the mode of transportation from Albany, defendant owed no duty to plaintiff beyond the delivery of the property in the usual course of business to safe and responsible carriers for transmission to its destination. *Brown* v. *Dennison*, 2 Wendell, 593; *Van Santvoord* v. *St. John*, 6 Hill, 157. But when the forwarding agent is instructed as to the wishes of his principal and elects to disregard them, he is guilty of a plain breach of duty and when he sends goods in a mode prohibited by the owner he does it at his own risk and incurs the liability of an insurer."

In the case of *Goodrich* v. *Thompson*, 44 N. Y., 324, the court adjudged the following proposition: If any express company contracts to forward goods by a particular steamer, but in fact sends them by a different steamer and they are lost, the company is liable for the loss. The fact that the specified vessel is withdrawn from the route so that the goods could not be shipped by her does not authorize them to forward by any other usual, customary and proper mode of conveyance. *It is their duty to notify the owner and await instructions.* Forwarding by another vessel being unauthorized, they are responsible for the consequences.

In the case of *Maghee* v. *R. R. Co.*, 45 N. Y., 514, the court adjudged the following to be the rule in this class of cases, namely: When a carrier accepts goods to be carried, with a direction on the part of the owner to carry them in a particular way or by a particular route, he is bound to obey such directions, and if he attempts to perform his contract in a manner different from his undertaking, he becomes an insurer and cannot avail himself of any exception in the contract. In that case there was a judgment in the trial court for the railway company which, on appeal, was reversed by the Court of Appeals. There is a full consideration of the case in the opinion delivered by Judge Andrews, and also of the above proposition adjudged by the court in the case, with the citation of a number of authorities, commencing at page 522 of the opinion.

See also *Hinckley* v. *R. R. Co.*, 56 N. Y., 429.

In the case of *Keeney* v. *Rwy. Co.*, 47 N. Y., 525, the company contracted to transport a quantity of cattle from Goderich to Buffalo. The cattle were sent to Brantford, and there the cars containing them were detached and placed upon a side track where they could neither be unloaded nor fed and watered, and were left for two

or three days, and consequently some of the cattle died and others were injured. The court held that the above was not an act of negligence in the execution of the contract, but an entire and intentional abandonment of all effort to perform the contract for the time, thus constituting a breach of contract, and the defendant was liable.

In the case of *Robertson* v. *National S. S. Co.*, 14 N. Y. Sup., 313, it appeared that the defendant carrier by its bill of lading acknowledging receipt of a quantity of goat skins in good order, agreed to forward them from Havre, France, by a certain steamer to London, to be there transported upon another steamer to New York. Defendant shipped the goods from Havre to Southampton and thence by rail to London, and the court held that this was a deviation from the terms of the contract, which made defendant liable as insurer for damages to the skins from their becoming wet and slimy before their arrival at London, although the cause thereof did not appear, and that the express terms of the contract could not be varied by any usage among shipping men as to routes. The court, in its opinion in that case, used the following language: "The bill of lading expressly provides that the carrier shall not be liable for damage from sweating, inherent deterioration, rain, spray or perils of the sea. From the evidence it is clear the defendant is not liable unless it be for deviating from the terms of the contract in shipping goods to Southampton and sending them from thence by rail to London, instead of forwarding them by the steamer Wolf direct to London as provided by the bill of lading. If it was clear that the damage to the skins resulted from their own inherent characteristics and that deviation had nothing whatever to do with their subsequent impaired condition, the deviation might be regarded as of no consequence; but it is impossible to hold that the

deviation may not have led to the wet and slimy condition of the skins which was discovered when they arrived at London. *It is not for the court to determine whether the usual and customary route or one prescribed by the consignor is best suited to obtain safety and dispatch. The consignor may select his own mode of conveyance and has a right to require that the contract be fulfilled in the manner agreed. Dunseth* v. *Wade,* 2 Scam., 285. *If it is not so fulfilled the carrier takes all the chances and assumes all the risks and this is precisely the position in which the defendant placed itself by the deviation aforesaid. How or from what cause the skins became wet and slimy as discovered at London, does not appear. Whether they would have fared different if they had been forwarded by the Wolf direct to London, is left to conjecture. The risk of this cannot be put upon the plaintiff, for defendant took the chances and must now bear the loss.* The contract was to carry the skins to London by the Wolf. This meant direct to London by water and without changes. If that was possible—and it was—the consignor was entitled to have his goods forwarded as he directed and the failure of the defendant to perform its contract in this regard made it an insurer and responsible for the loss. Hutchinson on Carriers, Sec. 314. The rule is that if a carrier attempts to perform his contract in a manner different from his undertaking, he becomes an insurer for the absolute delivery of the goods and cannot avail himself of any exceptions made in his behalf in the contract. Lawson on Contracts, p. 122. *Maghee* v. *R. R. Co.,* 45 N. Y., 514."

In the case *Seavey Co.* v. *Union Transit Co.,* 106 Wis., 394, it appeared that a railway company received goods consigned to the plaintiff at West Superior, upon a bill of lading providing for their transportation over the company's road in care of a certain steamship com-

pany at Buffalo, from which point to West Superior the latter operated a regular line of boats. At Buffalo the railway company delivered the goods to a different steamship company, the defendant, which ran a line of boats to West Superior and Duluth, and which contracted to transport the goods to West Superior on a specified vessel. Defendant had no notice or knowledge of the original transportation contract. For its own convenience the defendant transferred the goods at Duluth to a railway company to be carried to West Superior, and while in possession of such railway the goods were damaged. It was held by the Wisconsin Supreme Court (1) that, except as it constituted the first carrier a forwarding agent, the original bill of lading has no force as between plaintiff and defendant, and its provisions as to the responsibility of an intermediate and forwarding carrier are irrelevant; (2) the delivery to another carrier at Duluth was a breach of defendant's contract, and rendered it liable as an insurer for any injury or loss that would not have occurred had it performed its duty."

In the case of *Rwy. Co.* v. *Brichetto*, 72 Miss., 891, it was held that a railroad company having transported vegetables consigned to a northern market to the junction of its road with another road in the same system, and finding that because of a strike they could not be forwarded over that road, instead of sending them by another available route, *without communicating with the shipper, as could easily be done*, diverts them to a southern market where they are sold at a sacrifice, is liable in damages. In that case the railway company had a contract of carriage of the plaintiff's vegetables from Edwards, Miss., to Cincinnati, O. On the freight reaching Meridian, where the goods were to be delivered to the Alabama Great Southern Railroad, called the connecting link, but really a link in the same system of which

appellant was a part, it was found impossible to forward the freight over that road by reason of a strike. On these facts the court, in its opinion, says: *"It was the duty of appellant in this unforeseen emergency to communicate with the shipper, if convenient, and take his directions. It was altogether practicable to have notified the shipper in a few minutes, and to have taken his advice, but this the appellant failed to do."*

In this case Mr. Frost, who is one of the plaintiffs, accompanied the shipment on defendant's cars as the representative of all the plaintiffs, and was never consulted with reference to defendant's movements of their cattle. (Record, pp. 37, 39, 40, 41, 195.)

In the case of *R. R.* v. *Odil,* 96 Tenn., 61, the court there held: A common carrier cannot justify a deviation *en route* upon refusal of a connecting carrier to receive freight on account of a strike, without notice to the shipper and instructions from him, where it appears that the goods could have been held and properly cared for without injuring their safety until such notice had been given and instructions received. It was also held by the court in the case that "A common carrier who unjustifiably substitutes another connecting carrier for the one named in the bill of lading, becomes insurer for the substituted carrier, and is liable for the loss of the goods while in the latter's possession, even by inevitable casualties." The facts of that case as appears from the opinion of the court were as follows: The potatoes of the plaintiff were shipped from Nashville, Tenn., destined to Chicago. The bill of lading, as well as the proof, showed that the potatoes were routed to go by the Louisville & Nashville Railroad Co. to Evansville, Ind., and from there by the Evansville & Terre Haute Railroad and into Chicago over the Chicago & Eastern Illinois Railroad. When the potatoes reached Evansville

they were tendered to the Evansville & Terre Haute Railroad immediately upon their arrival, but that road declined to take them on account of a strike then prevailing on the Chicago & Eastern Illinois Railroad. Thereupon the Louisville & Nashville Railroad Co. delivered the potatoes to the Peoria, Decatur & Evansville Railroad, which had a line into Chicago connecting with the Wabash Railroad at Sullivan, and running into the city over that road. This road at that time was open to Chicago and was as well equipped and as expeditious as the road over which plaintiff had routed the potatoes, and was in no sense inferior. After the potatoes had been delivered to that road and had started upon their transit the strike spread to the Wabash road, and that road refused to receive the potatoes on their arrival at Sullivan, the junction point. The potatoes were thereupon taken back to Peoria and placed in the hands of a warehouse man and sold for the railroad upon the idea and belief that being perishable this disposition was the best for the shipper and other persons concerned. No notice was given to the plaintiff that the Evansville & Terre Haute Railroad had refused to receive the potatoes at Evansville, or that they had been sent over the Peoria road, or that they had been diverted to and sold at Peoria. Plaintiff refused to accept the proceeds of the sale. Based on these facts the court, in its opinion, says: "It is insisted in the assignment of errors that under the facts in this case an emergency had arisen which justified a deviation in route, inasmuch as the one chosen by the shipper was closed by a strike and the other equally good was open. There is no doubt that when, in case of an unforeseen necessity, the safety of the shipment demands a deviation from the route agreed upon with the shipper, it may be made and will be justifiable, as, for instance, forwarding perishable freight by rail when a storm pre-

vents a boat from proceeding upon its voyage; *but where the goods can be properly cared for and held until the shipper can be communicated with, the carrier will not be justified in selecting another route without notice to him and instructions from him.* Ray on Freight Carriers, Sec. 1. Hutchinson on Carriers, Sec. 14. See also *R. R.* v. *Campbell*, 7 Heisk., 261. *Unless justified by urgent circumstances a deviation by the carrier will render it responsible for losses resulting even from inevitable casualties, and the original carrier becomes in effect an insurer for the line he selects.* Ray on Freight Carriers, Sec. 79. Hutchinson on Carriers, Sec. 314. *It clearly appears in this case that the plaintiffs could have easily been consulted by letter or wire and their instructions t ken, when it was found that the route selected was closed at Evansville, and the shipment safely held in the meantime; and failing to do this, the defendant road must be held to be liable for any injury resulting from the substituted route."*

The case of *Merchants' Dispatch Tr. Co.* v. *Kahn*, 76 Ill., 520, illustrates the principle of liability in cases of deviation in transit. In that case the goods were shipped from Worcester, Mass., for Matoon, Ill., as the point of destination, and the usual course of carriage and transit was by way of Indianapolis and not by way of Chicago, but in that case the carrier took the goods to Chicago and stored them in a warehouse where they were destroyed by the great Chicago fire; the court held on those facts that the carrier was liable for the loss.

In Vol. 1, Am. & Eng. Enc. Law (2d Ed.), 594, the author uses the following language: "Thus it has been held that although a hard frost may be considered an act of God, yet damages to goods on board a steam vessel by the leaking of a pipe which was burst by the frost is a loss for which the carrier may be held liable,

and if a cargo is injured by a storm at sea during a deviation from the usual course by the master of the vessel, it has been maintained that the deviation is a sufficient proximate cause of the loss to enable the freighter to recover."

In Vol. 5, Am. & Eng. Enc. Law (2d Ed.), 422, 426, the author on this subject of deviation says: "The carrier is liable for any loss occurring in the course of a deviation from its proper route or from the instructions of the shipper as to other matters, no matter from what immediate cause the loss may arise. It has been urged with much force that the very fact of a deviation ought not to affect the carrier's liability unless it be shown further that such fact contributed in a direct way to cause the loss, *but the rule has been strictly adhered to that the shipper is bound only to prove a deviation and the loss in the course of it; upon such proof the carrier is liable unless it can be clearly shown that the loss would have occurred had there been no deviation. * * * In cases of emergencies which justify a deviation and when the owner's consent might fairly be presumed, the carrier may act in contradiction or modification of the letter of his instructions, but in all such cases should give notice to the owner, as soon as practicable, of what has been done."*

In Hutchinson on Carriers, Secs. 190, 191, the subject of the liability of the carrier in cases of deviation is fully stated. In Section 190 of that work the author says: *"So if the carrier deviate without necessity from the regular and usual course, he will be held responsible for any loss which may occur, whether by the act of God or from any other source, and it will not be competent for him to show that had he gone the usual and customary route he would, in all probability, have encountered the same danger with the same conse-*

quences, nor would it avail him that had he done so the same misfortune would beyond a reasonable doubt have overtaken him."

In Lawson on Bailments, Sec. 127, the rule in cases of deviation is stated thus: "Loss by act of God after deviation. Deviation is the voluntary departure from the voyage or route without necessity or reasonable cause. Necessity can alone sanction it in any case, and then it must be strictly commensurate with the *vis major* producing it. *If a master deviates from the usual course of his voyage and damage is caused by a tempest in itself the act of God, the proximate cause of the loss is the wrongful act of the master and he is responsible for it. The same rule applies to carriers by land.* If the carrier has agreed to send goods by land and he sends them by water, or if he has agreed to carry them by canal and he takes them out to sea, and they are lost by an act of God, he is liable. So, if he agrees to send them by one line of boats and sends them by another, or if he agrees to send them by steam and he sends them by sail, the burden of showing a necessity for the deviation rests upon the carrier, and the necessity must be real and not merely apparent. If the deviation is one for the convenience of the carrier, he assumes the risk for any loss that may occur and becomes an insurer at all events."

In 6 Cyc. Law & Proc., 383, 384, the author uses the following language: "If the carrier, in transporting the goods, unnecessarily deviates from the usual and ordinary route contemplated in the undertaking, he will be liable for any loss occurring during such deviation, although such loss is within the recognized exception to the carrier's liability. Indeed, it is said that in departing from the established route the carrier is guilty of misfeasance and is liable for the value of the goods on the theory of conversion. The carrier is equally liable where,

having expressly contracted for a particular route, mode or manner of transportation, he transports goods otherwise than as stipulated and they are lost or damaged. Thus if the carrier leaves goods at a point short of their destination he becomes absolutely liable for loss or injury. It may become necessary for the carrier, by reason of some emergency not contemplated at the time of shipment, to change the route or method of transportation, and, if so, he will not be liable for subsequent loss or injury for which he is in general not responsible by law or contract, but if it is practicable in such case without risk to the goods, to notify the shipper, the carrier should do so rather than to depart from the terms of the contract, and await further directions. There is some uncertainty as to whether, when a deviation from the usual or stipulated route or method of transportation is shown, the carrier may excuse himself by proof that subsequent loss or damage, for which he would not but for the deviation have been liable, would have occurred had there been no deviation, but at any rate it is incumbent on the carrier to clearly and satisfactorily establish that fact, which usually he will be unable to do."

In the case of *Marsh* v. *Union Pacific R. R. Co.*, 9 Fed. Rep., 873, the United States Circuit Court for the District of Colorado held that when goods are sent not according to the contract with the owner but by some other route, there is no lien for freight money.

In the case of *Ins. Co.* v. *LeRoy*, 7 Cranch., 26, the United States Supreme Court passed on this question of deviation in an insurance case. In the opinion in that case the court said: "The discharge of the underwriters from their liability in such cases depends not upon any supposed increase of risk, but wholly on a departure of the insured from the contract of insurance. The consequences of such violation of contract are immaterial to

its legal effect as it is *per se* a discharge of the underwriters, and the law attaches no importance to the degree in cases of voluntary deviation. Necessity alone can sanction a deviation in any case, and that deviation must be strictly commensurate with the *vis major* producing it."

In the case of *Hostetter* v. *Park*, 137 U. S., 30, l. c., 40, the United States Supreme Court, in its opinion, said: "A deviation is defined to be a voluntary departure without necessity or reasonable cause from the regular and usual course of a voyage in reference to the terms of a policy of marine insurance, but it is no deviation in respect to such a voyage to touch and stay at a port out of its course if such departure is within the usage of the trade." In the case at bar the question of usage does not arise, because there is neither evidence nor pretense of any usage that shipments of cattle from Texas to Atchison may be deviated away from the main line across the Kaw at Topeka to Kansas City.

In the case of Constable v. *Steamship Co.*, 154 U. S., l. c., 61, *the court, in its opinion, says: "In the law we may deem a deviation as defined to be a voluntary departure without necessity or any reasonble cause from the regular and usual course of the ship insured.* 1 Bouv. Law Dict., 417. *Hostetter* v. *Park*, 137 U. S., 30, 40. *Davis* v. *Garrett*, 6 Bing., 716. *Williams* v. *Grant*, 1 Conn., 487. *As for instance, where a ship bound from New York to Norwich, Conn., went outside of Long Island and lost her in a storm. Crosby* v. *Fitch*, 12 Conn., 410. *Or where a carrier is guilty of unnecessary delay in pursuing a voyage or in the transportation of goods by rail. Michaels* v. *N. Y. Central R. R.*, 30 N. Y., 564.

In *Express Co.* v. *Kountze Bros.*, 8 Wall., 342, the express company received from defendants in error a

quantity of gold dust for transportation from Omaha to Philadelphia, and in its receipt stipulated that it should not be liable "for any loss or damage by fire, the acts of God, or the enemies of the government, mobs, riots, insurrections, or pirates, or from any of the dangers incident to a time of war." There were two routes over which the property might be sent; one through the state of Iowa and the other by way of St. Joseph, and by railroad across the state of Missouri. The former was the safest by reason of the disturbed conditions of Missouri on account of the war then in progress; the latter route was the more expeditious though the more hazardous. Plaintiffs, so one of them testified, notified the company's agent not to send the gold dust by the St. Joseph route. The company, nevertheless, did so, and the gold dust was lost by robbery while in transit through Missouri. The court said (p. 353): "If this testimony be true, it is hard to conceive a case of grosser negligence, for here were two routes—the one safe and the other hazardous—and yet the express company, in definance of the wishes of the owner of the property, rejected the safe and adopted the hazardous route. *Carriers of goods cannot escape responsibility if they behave in this manner, for they are required to follow the instructions given by the owner of property concerning its transportation whenever practicable.*" Judgment against the express company was affirmed.

In *L. & N. R. R.* v. *Duncan*, 34 So., 988, s. c. 137 Ala., 446, a car of mules were delivered to the railroad company for transportation from Birmingham, Alabama, via Montgomery, and thence over the Plant system to Greenville, Florida. No one for the shippers acccompanied the shipment. On arrival at Montgomery the Plant system refused to take the shipment, and the company, without communicating with the owners, for-

warded the car by another and much longer route, whereby the owners claimed damages to the shipment. Judgment for the plaintiffs was reversed and the cause remanded for a new trial, not because there was no case, but because of the insufficiency of the petition, but the court said (p. 990): "On the state of facts existing with reference to this consignment, after the car had reached Montgomery, and the Plant system had refused to accept it for carriage to Greenville, * * * *it was defendant's duty to give notice of that fact to the consignors, to the end that they might give further directions as to routing the consignment, unless the property was of such perishable nature as that the time necessary to give such notice and to receive such instructions would have caused a delay in forwarding calculated to injure or destroy it.* * * * *Live stock is, of course, perishable in a general sense; but we apprehend that horses and mules released from the car and in a pen at Montgomery, as these were, were in no danger of perishing while the defendant was communicating with the consignors at Birmingham, and receiving their reply.* It seems clear to us, also, that the parol evidence as to the consignors having given direction for the consignment to go from Montgomery by the Plant system, did not tend to vary or contradict the stipulations of the bill of lading, and that the evidence received on this subject, if believed by the jury, established the fact that the consignors directed the transportation to be over the Plant system."

In *Gulf C. & S. F. Ry.* v. *Irvine*, 73 S. W., 540 (Tex. Civ. App.), the court said: "The facts in this case show that appellees demanded that their cattle be shipped over appellant's line from San Angelo, Texas, to Brownwood, Texas, and thence over the line of the Fort Worth & Rio Grande Railway. This the appellant refused to do, and routed the cattle over its line by way of

Temple and Cleburne, a distance of 115 miles further than by the route desired by appellees. The shipper usually has a right to select the route over which his goods are to be shipped, *and the carrier will be held liable for all damages resulting from a deviation from the route selected by the shipper.*"

IV.

We submit, in conclusion, that the defendant should by this court be held liable to plaintiffs for their demand herein, both on the grounds of deviation and negligence and that the judgment should be reversed, and the cause remanded with directions to the lower court to grant a new trial.

Respectfully submitted,

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THE MINNESOTA AND DAKOTA CATTLE COMPANY, *Plaintiff in Error,*

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, *Defendant in Error.*

No. 2277.

STATEMENT.

As shown by the petition (Rec., 5-11) this is an action to recover the sum of $42,621.37 damages alleged to have been suffered by the plaintiff by reason of the defendant's wrongful conduct and negligence as a common carrier for hire, of freight, consisting of three train loads of live stock belonging to the plaintiff, two trains being shipped from Kenna in the Territory of New Mexico, and one from Bovina, in the State of Texas, all to be transported over the line of the defendant's railroad to Atchison, Kansas, thence by the Kansas City, St. Joseph & Council Bluffs, or Burlington route, to Council Bluffs, Iowa, thence by the Chicago, Milwaukee & St. Paul Railroad to Evarts, South Dakota. The allegations of the petition are substantially identical with those contained in the petition filed in the preceding case. The essential specifications of the respects in which the defendant was guilty of wrongful and negligent conduct and violation of its duty as a common carrier, whereby plaintiff's loss was sustained, are the same in both cases. Briefly the history of the movement of the three train loads of cattle in controversy in this case is as follows:

Stuebe (Rec., 385, *et seq.*) testifies: The cattle were bought in Texas by the plaintiff Cattle Company about

April 20, 1903. The first train load, of 21 cars, left Kenna, New Mexico, by the Pecos Valley Railroad Monday, May 25, between five and six o'clock p. m. The second train load left Kenna, Tuesday, the 26th of May, between six and seven o'clock p. m. and consisted of 22 cars, 3 cars of which train were dropped at Amarillo, Texas, and the train went on with 19 cars. The third train load, from Bovina, Texas, consisting of 17 cars, picked up the 3 cars at Amarillo, making 20 cars in that train. This train left Bovina, Texas, between nine and ten o'clock p. m., Tuesday, May 26th. The three train loads comprised 2293 head of cattle. Both Kenna trains were ahead of the third train from Bovina, which was personally accompanied by the witness Stuebe, who was personally interested in the plaintiff Company and its representative. The other two trains were also accompanied by representatives of plaintiff, the owner. The Bovina, or third train, reached Wellington, Kansas, between six and seven o'clock p. m. Wednesday, May 27th, and the cattle were there unloaded and fed. This train left Wellington between seven and eight o'clock a. m., Friday, May 29th, having been held there by the defendant about 36 hours. Its next stop was at the Kansas City Stock Yards, where it arrived between six and seven o'clock a. m. Saturday, May 30th. The first train from Kenna, which had started from that station, as stated, Monday, May 25th, between five and six o'clock p. m. and the train load of the Empire State Cattle Company, in controversy in the preceding case, arrived at Kansas City at the same time, Saturday morning, May 30th. The second Kenna train, which started from Kenna, as stated, the evening of May 26th arrived in Kansas City Friday evening, May 29th (p. 387). This train started 24 hours later from the point of shipment, and arrived at Kansas City 12 hours sooner than the first Kenna train.

Witness Welsh, plaintiff's ranch foreman (p. 348), had charge of and accompanied the first train shipped from Kenna on Monday, May 25th. His first stop was made also at Wellington on the evening of the 26th, between ten and eleven o'clock. He requested to be loaded out next morning at five o'clock, the 27th, but was not loaded out until the evening of the 27th about seven o'clock. The train ran that night to the first station beyond Strong City and then was taken back to Strong City and unloaded there about daylight on Thursday, the 28th. It also was detained at Strong City all of the 28th, and was re-loaded Friday morning, the 29th, leaving Strong City about noon on that day, and arrived at Kansas City, as stated, Saturday morning, May 30th (p. 349). This witness states that the 20 cars in his train got all necessary feed at Wellington, Kansas, but only got one bale to the car at Strong City. He saw Mr. Frost, of the Empire State Cattle Company and both the trains of that company at Strong City. In other words this train of cattle and the train of the Empire State Cattle Company, which was in charge of the witness Cloyd (Rec., preceding case, p. 31), which went on to its destination and missed the flood, and the train in charge of Frost in controversy in the companion case, were all three at Strong City at the same time. The train in charge of Cloyd was sent on and reached its destination in safety, the two trains in charge of Frost, for the Empire State Cattle Company, and Welsh for the Minnesota & Dakota Cattle Company, were not sent on from Strong City until about noon on Friday, the 29th, when they were hauled as one train to Kansas City, reaching there, as stated, Saturday morning, the 30th. The train load belonging to this plaintiff, which arrived at Kansas City Friday night, and the two train loads belonging to this plaintiff and the one train load belonging to the

Empire State Cattle Company, which arrived Saturday morning, were all unloaded in the Kansas City Stock Yards and placed in what is known as the Shipping Division of the Yards. From that time on, the history of the cattle belonging to both plaintiffs in these cases, is identical. The statement in the preceding case, of the history of the flood of 1903 in the Kaw River, the details there given of the conduct and misconduct of the defendant in the movement of these cattle, it is unnecessary here to repeat. The acts and omissions, on the part of the defendant, complained of, are precisely the same, and everything in that regard that is there said applies with equal potency in both cases. About one fact, which we regard as of vital importance, there can be no doubt, and that is, all of these trains were originally routed from their respective stations of shipment by way of Amarillo, Texas, thence by the defendant's main line to Atchison, and thence by the Burlington north. The court in its opinion says, as to this fact (p. 647): "The way-bills upon which the cattle were shipped, and other evidence, discloses that the cattle were, by the initial carrier, routed over its line to Amarillo, Texas, thence over the defendant's line of road, by way of Wellington, Strong City and Topeka, to Atchison, Kansas, thence over the Burlington road to Council Bluffs, Iowa, and from thence to point of destination over the Milwaukee railroad."

In addition to the way bills (p. 125) sustaining this statement of fact as to the original routing of the cattle, the shipping contracts attached to defendant's answer in both cases, although the court says that they themselves did not specify the route, show by their endorsements (p. 19) of "Kenna, N. M., to Atchison, Kas." and "Bovina, Tex., to Atchison, Ks." what the route was; and the bond attached as an exhibit to defendant's answer in this case (p. 19), on which defendant grounded a cross

action for the recovery of the expenses incurred at Kansas City and in the subsequent pasturage of the cattle, taken and accepted by the defendant July 9, 1903, recites that this plaintiff shipped the three train loads of cattle mentioned, "all of said shipments to be transported over the line of the Atchison, Topeka & Santa Fe Railway Company, or its connections, as shown by the stock contract, to Atchison, Kansas, and thence forwarded to Evarts, South Dakota, the point of destination." Whatever, therefore, the legal effect of defendant's act in bringing these cattle to Kansas City, the unquestionable fact is that it deviated the shipments from the line of transportation selected and determined between the parties at the time the shipments were made, and of their own motion and without the consent of the plaintiff, or its representatives in charge of the cattle, and without consultation with them or any of them, hauled the cattle to Kansas City and unloaded them off of the main line at a point where it was never contemplated they should be. Nearly all of the facts alleged in the petition in regard to the negligence of defendant are, as the court in its opinion says (p. 645) practically undisputed. It is practically undisputed that these cattle were detained by the defendant company at Strong City and Wellington for a length of time more than sufficient for them to have been fed and watered and safely transported to Atchison before the flood interrupted traffic on defendant's main line. The last train, according to the testimony heretofore cited, crossed the Kaw River at Topeka on Friday morning, the 29th of May, and reached Atchison safely. One train load of the Empire State Cattle Company's cattle which was, as stated, at Strong City at the same time that part of the plaintiff's cattle and the remaining train of the Empire State Cattle Company were there and ready to be shipped, went through to its destination in safety. Indeed, the court says (p. 652):

"It is true that if this delay had not occurrred and the cattle had been promptly forwarded to and through Kansas City (Atchison?) they would not have been caught in the flood at Kansas City."

We, therefore, take the fact of the negligent and unnecessary delay on the part of the defendant as being established. It is an undisputed fact, also, that these cattle were in a safe place until they were brought into the Kaw valley and placed in the Kansas City Stock Yards near the mouth of that river, and at the lowest point in the valley. And again the court says (p. 652): "If they had been kept at such points until the flood had subsided they would not have been injured as they were at Kansas City."

The Court's attention has already been extensively called to the history of the flood and the situation of the defendant's railroad, and of its officers who directed and manipulated the movement of these trains. For brevity, and because the graphic delineation of that situation can not be improved, we will not attempt to go over it in detail. The fact that the flood conditions in the Kaw River and its tributaries began sometime prior to the defendant's receipt of these cattle for transportation; the fact that that stream had, for weeks before the climax of the flood, been constantly rising; the fact that the defendant's General Offices were located at Topeka and its officers managing the traffic of its road were in constant and intimate touch with the situation; the fact that when Superintendent Hurley assumed the responsibility of ordering these train loads of cattle to come forward to Kansas City on Friday, May 29th, he knew at that time that defendant's line from Topeka to Kansas City, and from Topeka to Atchison,, was impassable; the fact that he knew at that time that his order could not even be obeyed without hauling the trains by way of Olathe over the

Frisco tracks;—all these facts are practically undisputed.

The cattle having arrived in Kansas City, and being placed in the pens of the Shipping Division, the defendant did nothing toward getting them out to a place of safety. Kendrick, Live Stock Agent of the Burlington (p. 283), was ready to take the cattle out before any of them had arrived, and on Friday afternoon he went to the Santa Fe office to arrange to take the cattle out, but was told they were routed by the Missouri Pacific.

A rough sketch of the situation of the Stock Yards, with reference to the Kaw River, will be found on page 235 of the record. The office, at that time, of defendant's local Live Stock Agent was at Argentine. When Kendrick went to the defendant's office in the Exchange Building to arrange about taking the cattle out, the person in charge, at his request, confirmed by 'phone from the Argentine office, his statement that the cattle were routed by the Missouri Pacific. Kendrick, it seems, was even then afraid to credit the statement that his road was not to take the cattle, and satisfied himself by speaking to defendant's Argentine office over the 'phone, and in that conversation he was told the same thing. (p. 286). The Burlington had plenty of cars and equipment. Its loading chutes were in the south end of the Stock Yards just opposite the pens marked "Shipping Division," where the cattle were located, and south of the Exchange Building. These loading chutes and pens in the Shipping Division were on the highest ground in the Stock Yards. The loading chutes of the Missouri Pacific were quite a distance north of the Exchange Building and located at the lowest part of the yards. The Santa Fe office was advised by the Missouri Pacific office, as early as nine o'clock Saturday morning, that the latter road could not take these cattle. Mr. Douthitt, General Live Stock Agent of the Missouri Pa-

cific, whose special province and business it was to make arrangements of this kind, and who, the testimony conclusively shows, was the highest authority in the matter, of any agency of the road at Kansas City, testified (p. 267 *et seq.*) that the first he heard of the cattle being in Kansas City was about 8:30 Saturday morning, May 30th, at which time the Santa Fe agent first spoke to him about taking them out. He says (p. 272): "We told them we would not have the power to handle that many trains of cattle without notice; that the indications were we could not get them out under any circumstances. We would make an effort, if the water was not any higher by noon, to load one train that day." Yet, with this distinct and emphatic notification that the Missouri Pacific could not take the cattle, the defendant allowed the opportunity offered by the Burlington to pass, and there is no proof that they even applied to the Burlington, or made any effort to have the cattle taken out. That the Burlington could have taken them any time on Saturday is apparent from Kendrick's testimony, and from the fact that that road, having its loading chutes near the Shipping Division in the highest part of the yards, as stated, shipped out a train load of 35 cars of cattle as late as six o'clock Saturday evening. (p. 289, 290).

Defendant had no arrangement with the Missouri Pacific to take these cattle at Kansas City. The statement of the trial court (p. 648) that it had is a mistake. If anything was needed to establish this fact, other than the clear and unequivocal testimony of the only official with whom that arrangement could be finally made at Kansas City, general live stock agent Douthitt, it is not lacking. The list of telegrams (pp. 179-195) is indeed a tangle of wires and they are not rendered more intelligible by their want of chronological order and the failure to enter on many of the copies produced the

hour and minute of their sending and receipt. But from these telegrams it is apparent that no arrangement was arrived at with Missouri Pacific to take the cattle at Kansas City. H. H. Clark, local superintendent at Atchison seems to have thought on Thursday, the 28th, that his road, the Missouri Pacific, would get 142 cars (including the cattle in question) from defendant at Kansas City. He wires Supt. Hurley 7:36 *a. m.*, 28th, (Thursday) (p. 188) "Will accept 42 cars stock Kansas City for Sioux City and Evarts S. D. *with distinct understanding your line will accept all responsibility and pay all claims* that may arise by reason of delays due to high water. * * * *Stock will not move unless above accepted.*" Later, same day, 7:57 *p. m.* (p. 188), he wires "Cannot accept 100 additional cars stock at Kansas City until further advised." Then still later, same day, he wires, 9:52 *p. m.* (p. 189) "Will accept the stock at Kansas City. Advise when you will deliver the 100 car lot." *These are all the wires from Clark on Thursday, 28th, between 7 a. m. and 10 p. m.* It was doubtless these dispatches which lead the Court to so confidently assert that it was arranged with the Missouri Pacific to take the stock at Kansas City. But see what Mr. Hurley was doing on the 28th. He wires General Supt. Burlington, St. Joe (188) "We have 142 cars stock for you destined Sioux City, Iowa, Evarts, S. D. and Stair, Canada. Can you not accept this at Kansas City and handle it through." Burlington answers (p. 189) same date: "Mr. Barnes of the Burlington wires at 6:10 p. m. Expects to have washout at Hamburg repaired by 3:30 p. m. today and if no further trouble can handle business over K. C. road as usual. At 7.26 p. m. he wires, yes, can handle stock for Evarts, S. D. Kansas City to Council Bluffs." *Then same day Hurley wires his superintendent at Topeka,* McLellan: "I have told

Fox to load stock held at Strong City and Wellington which amounts to 100 cars. *K. C. St. J. & C. B. now advise us they are open and can accept it.* If anything arises so they cannot accept it before it reaches Kansas City deliver to Missouri Pacific." He also wires Clark same day (28th) answering the latter's proposition of conditional acceptance: "The stock goes to you on revenue basis, is not detoured, therefore cannot accept any responsibility. We loaded it on your previous acceptance and have it in transit. Will you protect at Kansas City." To this, as seen above, Clark replied by his wire of 9:52 p. m. that he would accept stock at Kansas City and asking when the 100 car lot would be delivered.

Now note what Mr. Hurley had accomplished on this 28th day of May. He had made a definite and distinct arrangement with Clark for the Missouri Pacific to take the 142 cars of stock at Kansas City. Clark, it affirmatively appears from Douthitt's testimony had no authority, as superintendent at Atchison, to make the arrangement, but he did make it and could doubtless have had it ratified. *Mr. Hurley also had made on this same day a definite arrangement with the Burlington General Superintendent for that road to take these same* 142 *cars of stock at Kansas City.*

He seems strangely determined to get this hundred thousand dollars worth of cattle over or into the swollen and constantly swelling Kaw, if it took two connecting carriers to do it. The first 42 cars of the 142, *which he had promised both roads,* were delivered to Burlington. So Clark, Friday, 29th, (p. 192) in an offended sort of tone wires: "All arrangements made to handle the 142 cars cattle. Am now advised first 42 cars delivered Burlington. Advise. Also inform me in regard to other 100 cars. When will it be delivered." This Hurley

seems not to have answered and Clark wired him again 9:14 a. m. Friday (p. 194). "We are holding crews at Kansas City to protect stock. Am now advised you turned the 43 cars over to Burlington. *Can you say if we will get the* 100 *cars? If not wish to turn the crews back to Atchison.* Please answer quick." Let it be particularly noted what defendant's general superintendent did with this opportunity to have these cattle transported out of this perilous valley into which he was bringing them. He threw it away. Defendant had already broken faith with Clark by turning over to the Burlington nearly one-third of the cars which he had prepared to take, and it was natural and essential that he should desire to save his road the trouble and expense of having crews and equipment on hand to receive the cattle, if he was to be fooled a second time. This is Mr. Hurley's answer (p. 194). "Your wire in regard stock. 19 cars will reach Kansas City about 1:30 p. m. today. Balance of it will reach Kansas City late this evening or tonight. *Cannot give you correct figures on it now, but will do so as early as possible.*" He never did so. This is the last word of the defendant to the Missouri Pacific, until it took the matter up with Mr. Douthitt Saturday morning, the 30th, about 8:30 when they were told that Missouri Pacific was not prepared to take the cattle. Of course it was not. Hurley in reply to Clark's pointed request, twice wired, to know if he would get the 100 cars, does not even tell him he can have the 19 cars expected in Friday afternoon, but says "cannot give you *correct figures* on it now, but will do so as early as possible." All this fully explains why Kendrick, the Burlington agent, went to the Santa Fe office Friday afternoon to arrange for taking out the expected cattle. There had been no disturbance or violation of the agreement made Thursday the 28th with the Burlington through its general superintendent at St. Joe to take out the 142 cars. All

of these that had arrived, 42 cars, it had received and transported. The balance were coming and Kendrick was on hand ready to receive them. But is it not incomprehensible that defendant, after having thrown down Clark, should fail to avail itself of the chance which was at hand of having the Burlington take the cattle out? Why should the Santa Fe office tell Kendrick that Missouri Pacific was going to take the shipments when it was not, and Mr. Douthitt had distinctly so told defendant's agents as early as 8:30 that morning? The explanation is not far to seek. Mr. Hurley had wired Clark: "Cannot give you *correct figures* on it now." Were there any *figures* about it except that there were 100 cars of stock which "will be in this evening or tonight? There were. Mr. Mullen, president of plaintiff, says (p. 408) that the through freight contracted to be paid was $111.00 per car from Kenna to Evarts, and $100.00 per car from Bovina to Evarts. Mr. Brown. chief clerk live stock department of the Santa Fe, testified (483) that under the general rule a certain portion of that $111.00 per car and $100.00 per car would go to the Santa Fe for hauling to Atchison and a certain other portion to the Burlington for hauling from Atchison to Council Bluffs, and a certain other portion to the Milwaukee for hauling from Council Bluffs to Evarts; that (486,487) under the general rule, the haul from Atchison to Council Bluffs not being the same as from Kansas City to Council Bluffs, the same pro rata of the through rate would not apply to the two hauls; and that if a shipment were made over the Santa Fe that was to go by the Burlington to Council Bluffs from Atchison and that shipment came into Kansas City, it would be necessary to make some special arrangement with some other carrier to make the longer haul from Kansas City to Council Bluffs. It is manifest where Mr. Hurley's

"figures" come in. Neither the Burlington nor any other road would haul from Kansas City to Council Bluffs for the same proportion of the through rate as from Atchison. It is plain that by dickering with these two roads and playing one against the other the defendant frittered away the opportunity which both afforded to save these cattle. But whatever the explanation or whether there is any or not, the fact cannot be successfully denied that defendant repudiated its arrangement with Clark and refused the cattle to the Burlington which was ready to take them. It tried to run on two tracks at once and failed to get on either, for no other perceptible reason than in order to save a few hundred dollars in freight. Therein it was grossly neglectful of its high duty to the plaintiffs. It continued its policy of neglect all day Saturday, 30th, making no effort whatever to get the cattle out of the dangerous location in which it held them—except in the case of 20 cars of this plaintiff's stock, the story of which will be told later on in this statement. Steube for plaintiff haunted defendant's office during Saturday trying to induce its officers to take some action. As soon as he arrived he went at once to see the Santa Fe agent at defendant's office in the Exchange Building. This was about seven o'clock Saturday morning (388)—found the office locked—went then to office of Mr. Allen—remained there awhile when he and Allen returned to defendant's office about 7:30 a. m. They found there Mr. Brown, chief clerk of the general live stock agent, Mr. Titus. They told Brown (389) that they wanted to get the cattle out as soon as possible. He says "all right, we are arranging it now." He went to Burlington office and back to Santa Fe office, found Brown out and went to breakfast. About eight o'clock he and Frost (of the Empire State Company) went to defendant's office

and Brown told them he was trying to get the cattle out then (p. 390). "I says I can't see why we can't get them out at once, at least the train that got in yesterday; *the Burlington man told he can get them out as soon as he gets orders.*" Brown's answer on receiving this information (which he or his office already had) is of importance as showing defendant's gross neglect and disregard of its duty. "He says the Missouri Pacific takes out your cattle"; although Mr. Douthitt had informed him or his office that under no circumstances could the Missouri Pacific do any such thing. When asked when this would be done Brown said, "I let you know soon." Then Steube and Frost went out and rounded up their helpers and charged them to stay around the yards as they were liable to leave at any time. Afterward about 9 o'clock a. m. they went back to Brown and were told they would get out about noon. They returned about noon (391) and were told that the Missouri Pacific would not take the cattle. What did defendant do in the afternoon and evening of Saturday toward making any effort to forward these cattle or remove them from their place of known peril? Nothing whatever. This record does not contain any evidence that the Santa Fe officials paid any attention to the cattle or did or attempted anything for their preservation and protection from Saturday noon until after the flood. It shows on the contrary that they did not. (Combs recalled p. 619-622). Heavy rises were known to be coming on top of a stage of water already threatening the whole valley. Child, general supply agent, of the Stock Yards Company, called by defendant, testifies (536) that the great volume of water which caused the enormous rise at Kansas City, Sunday morning, 31st, came from west of Manhattan. "Q. How long did it take that rise to run from Manhattan to the mouth of the Kaw? A. Forty hours."

"Q. How long would it take the rise to run from Topeka down the Kaw? A. About twenty hours." Connor of the United States weather bureau answers the last question (311), "not more than about thirty hours." He seems to know accurately, for he says: "The crest of the flood moved at the rate of two and six-tenths miles an hour in the Kaw." *So that, taking Connor's statement as the reliable fact, somewhere between midnight Friday the 29th and daylight Saturday the 30th, this destructive rise rolled its tide of waters past the very doors of defendant's general offices at Topeka.* Yet defendant's officers would have it appear, *and the Court in effect holds as a matter of law,* that on the appearance of this great rise at Kansas City, it was as unknown and unannounced to them as if it had started at the Belt line bridge, and no jury should be permitted to infer that they knew of or had any reason to apprehend its coming. Not only defendants' officers at Topeka, whence emanated all orders relative to the movement of these cattle, must have known early Saturday morning of the descent of this great volume of water, but it was known and apprehended at Kansas City because communication was not interrupted between the points, and Hutchings, superintendent of the stock yards, says (545) the "general order" to put the cattle in the viaducts was issued *Saturday afternoon.* Why he should call the order "general" is not apparent, because everybody else with cattle in charge in that great market, except defendant and one other party with a small bunch, had sense enough to get them out of the valley. There was nothing comparatively to which to apply the "general" order, except the cattle of these plaintiffs. They were driven into these narrow viaducts, Supt. Child says (545), partly Saturday night and mostly Sunday morning, the work being finished about ten o'clock. Steube says they were

driven up into the viaducts Saturday night beginning about ten o'clock and that they were all up there when he saw them about eight o'clock Sunday morning (393). This was an act of most reprehensible folly. It was plain that they could be neither fed nor watered in such a place. The viaduct is merely an elevated chute. They spent some hours, according to Child, cramming this valuable herd of more than 3,000 cattle into these viaducts when all the while they were within twenty or thirty minutes of the highlands and absolute safety. Supplies of men and horses ample to handle and take care of them were at hand. (Callen, p. 622.) But Assistant General Live Stock Agent Combs (p. 580), had heard of loose Texas steers chasing people, and then if taken out they would *"come in contact with dogs* and everything that would frighten that kind of cattle to death." So they were saved from the certain doom which awaited them, if taken to the hills, and were condemned to the viaducts as a preferable and more "practicable" fate. After the cattle had been given this Indian burial, that is after eight o'clock Sunday morning, Sparks, who had 700 mules just across the alley from the pens of the shipping division where these cattle had been yarded, drove them out of the valley and saved them (p. 345). Mr. Moore, one of defendants' counsel at Kansas City, saw the mules being driven out by the Allen Avenue viaduct about 11 a. m. Sunday the 31st (p. 422) The cattle remained in these viaducts eight days. The remnant of them were taken by defendant to Emporia, there pastured until July 10th when they were shipped to Evarts. Those belonging to the respective plaintiffs were not separated until after their arrival at Evarts (397). This plaintiff received 1,831 head out of 2,293, the rest were dead as a result of their being placed on the viaducts. The remnant was variously estimated to be worth at

Evarts from $10.00 to $15.00 per head (399). The cattle when shipped were worth $22.00 per head at points of shipment. The freight paid by plaintiff at Evarts was $6,438.00.

Plaintiff in its petition seeks to recover this loss and damage from defendant on the following grounds:

(1) The wrongful deviation of the shipments from their route.

(2) The negligence of the defendant in unreasonably detaining the cattle at Wellington and Strong City.

(3 Defendants' negligence, in sending the cattle forward into the Kaw Valley, at the time and under the conditions when it was done.

(4) Defendants' negligence in deviating the cattle and hauling them to Kansas City.

(5) Defendants' negligence in failing to remove or cause the removal of the cattle from the yards in time to escape the flood.

The answer (p. 11-14), after a general denial, sets up in the second paragraph a series of statements of fact, and we attempt a brief review of the evidence pertaining to each so far as it has not already been referred to.

(a) The answer asserts that defendant, before the arrival of said shipments at Topeka, was notified by the Burlington that it could not accept the cattle at Atchison because of washouts on its line, and that it then made arrangements with the Missouri Pacific to take the cattle at Kansas City. We have already conclusively shown that defendant made arrangements both with Clark, superintendent of Missouri Pacific at Atchison and with general superintendent of the Burlington at St. Joe to take the cattle at Kansas City; that it violated and repudiated the arrangement with Clark on Friday the 29th;

that when by reason thereof the Missouri Pacific made no preparation to take the cattle at Kansas City, defendant insisted on its taking them, when they knew it could not, and refused to allow the Burlington to take the cattle, when they knew it could. To this we have nothing to add, except to correct an error of the trial court on the facts in this connection. The Court says (p. 653) that the Burlington notified defendant it could not take the cattle at Atchison on account of washouts, and later notified defendant, it could take them, and then again notified defendant that it could not take them. All this is true. *But once more and after this,* it notified defendant that it could take them at Kansas City and agreed to do it, and did take all of them there that defendant would allow it to take, forty-two cars (p. 194).

(b) Defendant's answer states that it did transport the cattle to Kansas City, "with the knowledge, consent and acquiescence of plaintiff." No claim was made below and doubtless none will be made here that this is true. When the trains reached Kansas City, Steube, in charge, thought he was in Atchison (407). All of the evidence bearing on the matter shows that the cattle were brought to Kansas City solely by orders of defendant without a "by your leave" asked of plaintiff, though ample opportunity for consultation at all times existed.

(c) The answer next alleges that defendant did deliver twenty carloads of plaintiff's cattle, 760 head, to the Missouri Pacific Railway, at Kansas City and delivered the balance to the Stock Yards company to be held by that company until the Missouri Pacific could take them out. We assert and propose to demonstrate by citation of proof, mostly by defendant's witnesses, the entire falsity of this allegation. The point of fact of initial importance in this connection is as to the method of making delivery of cattle from one carrier to an-

other through the medium of the Stock Yards Company so that possession and control of the stock pass from one to the other. About this fact there will or should be no dispute. Child says (p. 540) the stock yards company paid the delivering road all charges that it had on its bills, took the cattle and bills, and turned the latter over to the receiving carrier with all charges including its own for feed and care added, loading out the cattle on the order of the receiving line. He says (539) that in effecting such delivery the stock yards company acts as agent for both parties. Mr. Douthitt, of the Missouri Pacific, testifies (283):

"Q. Where they were unloaded, as they were in this instance, how would your road get them? A. The way bills would be delivered by the Santa Fe to my office; we would place an order with the stock yards company to run those cattle to our loading chutes at a certain hour; the stock yards company would load them at that time into our cars or cars we furnished at that particular point; the way bills then would be forwarded to the terminal office by my office, and conductor of the train take them out and take them through."

There are very many pages of testimony introduced by defendant relative to the alleged delivery of these twenty cars and to the customary manner of making delivery through the stock yards to a connecting carrier. We deem it unnecessary to cite further testimony as to the method pursued, except to add that of defendant's local live stock agent, Roberts, who says (468) that the way bills from the train would be sent over to his office at Argentine by a messenger and then by him (Roberts) turned over to the office of the connecting line.

Now put all of the testimony under the glass and see whether delivery of these 20 cars of cattle to the Mis-

souri Pacific was ever effected, and whether the stock yards company, while holding all the cattle, ever ceased to be the agent of the defendant. First as to what was actually done with the twenty cars. Hildebrand, yardmaster of defendant, says (518) he got the train of stock about six o'clock in the morning, *immediately upon its arrival, and was ordered by the Argentine office of defendant* to take it to the Missouri Pacific yards. He "got hold of the train" on one of the main lines between the south end of the Santa Fe yards and Twelfth street, hauled it as far as Twelfth street, and then sent it on in charge of Santa Fe switchman Cappell (519). Cappell says (pp. 520-521) that he was ordered by Hildebrand to take the train on into the Missouri Pacific yards, situated some distance north of the Exchange building and just east of the Kaw river, and this he did leaving the train there. Ed. Davis, foreman of stock yards company for what is known as "the Missouri Pacific side" (508) testifies for defendant that it was his duty to see that cars were unloaded and loaded; that a switch engine and crew of the Missouri Pacific moved these cars to the Missouri Pacific chutes; that he had them unloaded and immediately drove them back south through the alleys and put them in the shipping division; that being through cattle that was where they belonged (510); that he did this of his own motion without any orders from anybody; that at the place where they were unloaded there were no pens fit to receive them (p. 511) as there was water in the pens at that time, possibly a foot, and still coming in (512); that if the Missouri Pacific took the cattle out they would be loaded at the same point where they were unloaded (514); that there were no cars there to load the cattle into at the time they were taken from the Santa Fe cars; and that after these cattle were unloaded the Missouri Pacific did not load

any cattle at those chutes (p. 515). So that, as far as concerns *the cattle* of these 20 cars, they simply had a circuitous journey, planned and ordered by the defendant alone, around through the Missouri Pacific yards, and were escorted by the yard foremen back through the alleys to the shipping division, where the rest of plaintiff's cattle were. Now as to the way bills for the 20 cars, without the delivery of which there could be no delivery of the cattle. D. Farley, chief clerk of defendant's local freight office, produces a receipt for these cars (p. 473), purporting to be signed by R. P. Isitt, local freight agent of the Missouri Pacific; says it was made out in the hand writing of one Evans, yard clerk of the Santa Fe (476); that he did not know who signed Isitt's name to it, but knows that Isitt did not (p. 477). Sullivan, defendant's chief night clerk at Kansas City says (p. 494), another receipt is in the handwriting of one Winthrop, an under clerk in the office; that he (Sullivan) altered the way bills of the 20 cars by scratching out the words "K. C. St. Joe & Council Bluffs" and writing "Mo. P.", and inserting in place of "Atchison" the letters "K. C." (p. 495); he directed Winthrop to deliver the bills with the receipt to the Missouri Pacific (p. 496), and never saw any of the papers after their delivery to Winthrop, until the day he testified. This receipt in two sheets marked 14a and 14b, is shown in the record (pp. 497-499), and bears the stamps, Missouri Pacific freight office, *June 30th*, 1903, and A. T. & S. F. Ry. Co., July 4th, 1903, *a month after Sullivan says he gave the papers to Winthrop*, and more than two weeks after the stock represented by the receipt (or what was left of it) had been placed by defendant in the pastures at Emporia. There is not a particle of evidence even tending to show that Winthrop or any one else ever delivered the way bills and receipt (14a, 14b) to the Missouri

Pacific. As to the Isitt receipt for the cars (marked 15) though much discussed, it was not introduced in evidence. Isitt says of it (p. 633): "That is a receipt for the cars, what is called an interchange slip. * * * That is a certificate that the cars have been received and taken for the purpose of adjusting the rental on the cars between different lines, that is the purpose of that slip. That is such a slip as is signed by both lines, no matter what the circumstances are under which the car is delivered, whether it is right or wrong it makes no difference. Q. It doesn't indicate anything then in reference to whether your line has accepted for further transportation to another point those cars, or not? A. Not at all." It will be borne in mind that Mr. Douthitt, when he told defendant's agent about 8:30 Saturday morning that the Missouri Pacific could not under any circumstances engage to take the cattle, told him also (and it was a mere matter of his disposition to accommodate) that he "would make an effort, if the water was not any higher by noon, to load one train that day." At exactly noon he tried with an engine to get to the Missouri Pacific loading chutes, but the water put out the fires and the attempt failed (p. 273): "Q. Now was there in fact any cattle delivered to your road—these cattle? A. No sir. Q. Did you receive from the Santa Fe any order for any of these cattle? A. No sir. Q. Did you receive from the Santa Fe any way bills? No, sir." Hutchings, superintendent of the stock yards, says (p. 546) that he did not know whether the bills for these four trains of cattle showed any routing by any particular line beyond Kansas City or not; that the cattle were taken out by the Santa Fe, the same road that brought them in; that the Stock Yards Company held them as agent for the Santa Fe, delivered them back to the Santa Fe, required Santa Fe to pay its charges, and if the Santa Fe intended them to be delivered to a con-

necting carrier, as a matter of fact it was not done. Roberts, local live stock agent, says (p. 468) that these way bills, in ordinary course, would have gone to his Argentine office by messenger and been sent by him to the office of the connecting carrier; *that he found these identical way bills in his office after the subsidence of the flood* (p. 469).

"Q. So that these way bills were not delivered to any connecting carrier at Kansas City, were they? A. Not that I know of, no, sir."

Mr. Combs testified (590): "Q. Your railroad company hauled these (cattle) back to Emporia or Lang to these pastures? A. Yes, sir. Q. And then hauled them from there on to Atchison, and by way of these other roads to Evarts? A. Yes, sir. Q. Under the same original routing and way bills that they had been loaded under from Texas? A. Yes, sir; they were carried to their destination on their usual way bills—on the regular way bills." He admits that in all the numerous conferences held in June between the parties to these suits relative to the cattle, no intimation was ever given that any part of them had at any time been delivered to the Missouri Pacific. The testimony of Mullen (635) and of Frost (636) shows that numerous interviews were held between them and defendant's representatives, Mr. Lathrop and Mr. Combs, in which plaintiffs were urged to take the cattle off of defendant's hands at Kansas City, and at no time did they say anything indicating that one trainload had been delivered to the Missouri Pacific. In the stipulation (528) introduced by defendant to support its cross action set up in the third count of the answer, it writes down and signs "it is agreed in this case that the defendant was compelled to pay out and did pay out, on account of plaintiff's cattle at the stock yards at Kansas City $2,428.60, and at Emporia

$2,820.38." Why should it be compelled to pay or pay anything, if in truth it had delivered, as alleged, twenty cars to the Missouri Pacific and the remainder to the Stock Yards Company for the Missouri Pacific?

In this same third count and counter-claim, it *pleads* the fact (p. 15) "that the said defendant company, as is the general custom, well known to plaintiff, in cases *where cattle in the possession of railway companies in the course of transportation* are fed, watered and cared for by a Stock Yards Company, paid to the said Stock Yards Company the sum of $2,428.60;" and assistant general live stock agent Combs acknowledges (585, 586) that the expense of unloading the 20 cars at the Missouri Pacific chutes was a part of these charges which defendant paid. Defendant, in this third count, not only *admits,* but *alleges* that all of these cattle, while in the Kansas City stock yards, *were in its possession in the course of transportation, and bottoms on that fact* its prayer for a judgment against this plaintiff for the expenditures there made on account of the cattle. Yet, in the face of all this overwhelming proof, the defendant, again acting on the principle of "any viaduct in a flood," seeks to save itself by climbing up on the tottering proposition that it had cleared itself of all responsibility by delivering 20 cars to the Missouri Pacific, and the remainder to the Stock Yards Company for the Missouri Pacific. This structure of falsework will break down, it has broken down; and the place where it was is covered by the truth.

(d) The answer next pleads that the damages sued for were caused by the act of God. Elsewhere in this combined brief is discussed the question of whether under the proof adduced defendant can, as a matter of law, successfully charge the responsibility upon the Almighty.

(e) The answer next pleads that plaintiff gave defendant no notice, as required by paragraph eight of the shipping contracts, of its claim for damages. Plaintiff's reply (pp. 21, 25) pleads compliance with said paragraph and waiver of its requirements. Due notice was given and claim made (216 *et seq.*) (324). Detail of the evidence, which abundantly shows waiver, is not deemed necessary in as much as no question in this regard was raised on the trial below or in the court's opinion.

(f) The third count of the answer is a counterclaim for the expenses incurred by defendant, while holding the cattle at Kansas City and Emporia, and at the conclusion of all the evidence was dismissed by the defendant (Rec. Minnesota & Dakota Cattle Co. case, p. 30).

The main questions to be determined are:

1. Did the court err on the facts disclosed in not directing a verdict for the plaintiff, by reason of the wrongful deviation of the shipments? If not,

2. Did the court err in refusing to submit the questions of negligence to the jury and in directing a verdict for the defendant?

SPECIFICATION OF ERRORS.

1. The trial court erred (Rec., 637) in refusing to give, at the conclusion of all the testimony, the instruction and charge tendered and requested on behalf of the plaintiff, that under all the evidence the jury should find that the defendant was liable, and to find for the plaintiff. The court should have so instructed, because the undisputed proof shows a deviation by the defendant, without plaintiff's consent, of the shipments of cattle from the route by which they were billed, and in such case as a matter of law defendant is liable for the loss sustained.

2. The court erred, after refusal of this peremptory instruction, in refusing to give and charge the jury, at plaintiff's request, instructions from 1 to 13, inclusive, (Rec., 638, 644), and in refusing to give each of said instructions.

3. The court erred in sustaining the motion and request of the defendant railway company to direct, and in directing, the jury to render a verdict for the defendant and against the plaintiff. (Rec., 30.)

4. The court erred in its opinion, shown in the record, in saying: "It, therefore, follows on the main case the request for instruction to the jury to render a verdict for the defendant must be sustained, and the like request of the plaintiff must be denied. This will be done." (Rec., 655.)

POINTS AND AUTHORITIES.

All propositions, and authorities cited and reviewed in support thereof, as set forth in the preceding brief, are here adopted pursuant to the stipulation and agreement between the parties that a joint brief might be filed.

In view of the fact that the errors assigned, and the propositions involved, are precisely the same in both cases, all of the authorities relied on by plaintiffs in error in both cases have been compiled and reviewed in the foregoing brief of the Empire State Cattle Company, *et al.* To avoid unnecessary repetition, we re-state briefly the points made, as follows:

1. For the purpose of determining whether the action of the trial court in peremptorily directing a verdict for the defendant was correct or erroneous, all of the testimony offered, both that which was admitted and that which was excluded, will be considered by this court.

2. The question of whether the defendant is liable as a matter of law for the wrongful deviation of the shipments, and whether, therefore, the court erred in refusing the plaintiff's request to direct a verdict for the plaintiff, is a separate and distinct question from that of whether the court erred in holding as a matter of law that there was no evidence sufficient to go to the jury, on the matter of the defendant's negligence. Plaintiff had and has a right to the separate determination of these questions.

3. Even if the plaintiff was not entitled to a peremptory instruction to the jury to find for the plaintiff, by reason of the wrongful deviation of the shipments, the other and further question of defendant's negligence

should have been submitted to the jury under proper instructions.

4. Under the facts proven, the question of the proximate cause of the injury was a question for the jury to determine as a matter of fact, and not for the court to decide as a matter of law. It should have been submitted to the jury.

5. The opinion of the trial court (135 Fed., 135) fails to consider many of the facts which are vital to a correct conclusion, and incorrectly declares the law of the case, as we have heretofore shown.

6. The trial court, in its opinion (*supra*, p. 142), recognizes that the defendant deviated these shipments on its own responsibility, as claimed by plaintiff, but incorrectly declares the law in such cases. Under the evidence the defendant is liable for the consequences of that deviation.

7. The propositions of law asserted by the trial court in its opinion are not supported by the authorities therein cited and relied upon.

8. The fact that immense quantities of household property and merchandise were lost in the flooded districts of Kansas City has no tendency to show that the defendant was not negligent in respect to the loss suffered by this plaintiff.

9. It was not necessary, as assumed by the trial court, to place these cattle in the overhead viaducts at the stock yards. It was a grossly negligent act to do so.

ARGUMENT.

Supplementing the argument heretofore made, we will refrain from making the brief more voluminous, except to devote a very limited space to the principle which should govern in determining whether a trial court should or should not take a case from the jury and peremptorily direct its verdict. A most instructive and luminous decision in which the duty of the trial court is defined and the principle applied, is found in the case of *Marande* v. *R. R.*, 184 U. S., 173. That was an action to recover from the railroad the value of certain cotton which was destroyed by fire while in defendant's cars on its tracks near its terminal wharf, it being claimed by the plaintiff that defendant was negligent (a) in operating its locomotives near the cotton on the wharf; (b) in failing to properly care for the property, and (c) in providing inadequate fire apparatus, together with lack of instructions in its use and lack of competent men to handle it. The Circuit Court, at the conclusion of the evidence, had directed a verdict for defendant, and the Circuit Court of Appeals affirmed the judgment. The defendant being incorporated under an act of Congress, plaintiff took the case to the Supreme Court by writ of error. That court reversed the judgment of the Court of Appeals and of the Circuit Court, and directed a new trial. Two assignments of error were considered; one that the case should have been allowed to go to the jury on the issue of deviation, and the other that plaintiff should have been allowed "to go to the jury on the general question of the loss of the cotton by the negligence of the defendant." Mr. Justice White, delivering the opinion, said (176): "In order to pass upon the issues arising on these assignments, the evidence must be con-

sidered. In taking it into view, however, we shall do so only to the extent necessary to enable us to decide the question of law which arises, that is, *was the evidence sufficient on the subject of negligence and deviation to go to the jury?*" After an elaborate statement of the evidence, he proceeds (186): "Such being the proof, was it sufficient to go to the jury? In answering this question, as we have said at the outset, we shall be called to pass upon, not the preponderance of the evidence, but whether it was adequate to go to the jury; and this involves not a decision as to the facts, but the determination of a proposition of law." He then quotes the governing principle from 172 U. S., l. c., 545: "If different inferences might fairly be drawn from the evidence by reasonable men, then the jury should be permitted to choose for themselves." And again from 179 U. S., l. c., 659: "It is undoubtedly true that cases are not to be lightly taken from the jury; that jurors are the recognized triers of questions of fact, and that ordinary negligence is so far a question of fact as to be properly submitted to and determined by them." Mr. Justice White then continues (191): "We come, then, to an analysis of the evidence for the purpose of ascertaining whether it was correctly decided that it afforded no reasonable ground upon which a jury, in the exercise of its functions, could have inferred that the destruction of the cotton by fire was occasioned by the negligence of the defendant. In doing so, we shall, of course, be mindful that as both courts below have held that the evidence had not the tendency stated, their decision is entitled to great respect—*a respect, however, which cannot relieve us from the duty of securing the plaintiffs in the enjoyment of their constitutional right to trial by jury if, in our opinion, the case made by them was one proper to be decided as one of fact by the jury, and not to be concluded as a matter of law by the court.*"

In the above cited case, the bill of lading provided for the carriage of the cotton by defendant to "the port of New Orleans," and thence by steamship to Havre, France. It seems that plaintiff contended both that defendant had deviated the shipment, whereby it was liable for the loss, and that the loss was occasioned by the negligences specified. The action of the trial court in holding that there was no sufficient evidence of the fact of deviation to authorize the jury to find such fact is approved by the Supreme Court, but guarded with the remark (p. 198): "We cannot say that testimony may not be introduced at the new trial which may modify the aspect of this question as exhibited in the record now before us." In the case at bar *the fact* of deviation is not at all in question, and the issue presented to this court in that regard is, what is the legal effect of that fact on the question of defendant's liability? Does it render the defendant liable, irrespective of the negligence charged? Plaintiff contends that it does. If it is right about this, the court should have so told the jury, leaving them to find and fix the quantum of damages. Or, is the conceded fact that defendant summarily hauled these cattle away from their line of shipment, without consulting the owner, a matter by which it incurred no responsibility, and of which plaintiff has no right to complain? In other words, is it an immaterial fact not bearing on the question of liability? The lower court so held. The Supreme Court seems, in the case just cited, to have thought it of vital moment, and that liability would as surely follow its existence as would non-liability its non-existence. On the question of negligence involved in the cases at bar, in order to approve the action of the trial court in directing a verdict for the defendant, it is necessary to hold,

1. That the fact of deviation is an immaterial fact;

2. That there is no evidence tending substantially to show, or from which a jury would be allowed to infer, negligence in detaining these cattle at Wellington and Strong City, or that even if the detention was negligent it was immaterial as not being the proximate cause of the loss;

3. That there is no evidence from which a jury will be permitted to infer that defendant's officers knew, or had reason to apprehend, at the time of bringing the stock to Kansas City, they were bringing them to a hazardous place, or that if they did, their negligence was immaterial because, as a matter of law, it was not the proximate cause;

4. That there is no evidence from which reasonable men could conclude that during Saturday, May 30th, defendant was negligent when its officers declined to send the cattle out over the Burlington, and made no effort to send them out otherwise, except to offer them to the Missouri Pacific;

5. That there was no substantial evidence that defendant's officers, on Saturday, May 30th, knew, or ought to have known, of the enormous rise coming, although the undisputed evidence of competent witnesses is that it came from west of Topeka, and must have passed defendant's general offices from twenty to thirty hours before reaching Kansas City;

6. That no jury will be permitted to find that the act of placing these cattle in the viaducts, when they could easily have been taken out of the valley, was other than the act of a reasonably prudent and careful person.

The authorities heretofore cited demonstrate the impossibility of upholding the action of the court in

taking the case from the jury on the facts shown. A common carrier cannot be guilty of doing the acts shown in this record, and of omitting to exercise that vigilance and care of property to which the shipper is entitled, and then evade responsibility by saying "It was the act of God—the Lord hath taken away."

It is respectfully submitted that the judgments should be reversed and a new trial of the cases directed.

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